(24,912)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 629.

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

LIZZIE M. MIMS, AS ADMINISTRATRIX OF THE ESTATE OF JOHN J. MIMS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

INDEX.

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THE STATE OF SOUTH CAROLINA:

n the Supreme Court, Fifth Circuit, Richland County, November Term, 1914.

IZZIE M. MIMS, as Administratrix of the Estate of John J. Mims, Deceased, Plaintiff-Respondent,
against
TLANTIC COAST LINE RAILROAD COMPANY, Appellant, and S. B. DIVINE, Defendant.

Nelson, Nelson & Gettys, J. H. Clifton, Attorneys for Plaintiff-Respondent.
P. A. Willcox, L. W. McLemore, Barron, McKay, Frierson & Moffatt, Attorneys for Defendant-Appellant.

Case and Exceptions.

Statement.

This action was commenced on the — day of ——, 1911. It was tried at Columbia before his Honor, Judge Thos. H. Spain, and a jury on the — day of ——, 19—, resulting in a judgment entered upon verdict directed by the Court in favor of e defendants. Upon appeal, the judgment was reversed (95 S. C., 70), and the case remanded for a new trial. It was tried the second me before his Honor, Judge R. W. Memminger, and a jury on the - day of ——, 19—, resulting in a verdict for plaintiff of $16,000.00 gainst Atlantic Coast Line Railroad Company, upon which verdict dgment was duly entered. In due time thereafter defendant served otice of Appeal, and the case is now before this Court upon the folwing Record and Exceptions.

Complaint.

The plaintiff, complaining of the above named defendants, alleges:
1. That John J. Mims died intestate in the City of Sumter, County Sumter and State of South Carolina, on the 19th day of Demnber, 1910, leaving him surviving his widow, Lizzie M. Mims, d four minor children, to wit: James Hobson Mims, aged twelve ars; Lola May Mims, aged nine years; Eva Gertrude Mims, aged e years, and Ada Elizabeth Mims, aged three years, and the said zzie M. Mims has been duly appointed and qualified administratrix the said John J. Mims, having been appointed such administratrix the Judge of Probate of Sumter County, January 24th, 1911, and ings this action for the benefit of herself and the said infant chilen of John J. Mims, deceased.
2. That when letters of administration were granted to plaintiff e was residing in the City of Sumter, County of Sumter, South

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Carolina, but since the death of her husband has been forced to seek work to support herself and the children of herself and her husband,
John J. Mims, deceased, and is now working in Columbia
3 Duck Mills, Columbia, South Carolina, and residing in New
Brookland, in Lexington County, just west of and across the river from Columbia, South Carolina.

3. On information and belief, that the defendant, Atlantic Coast Line Railroad Company, is a corporation duly organized and existing under the laws of the States of Virginia and South Carolina, and at the times hereinafter mentioned owned, controlled and operated a certain line of railroad, together with the tracks, cars and other appurtenances thereunto belonging, extending from and through the City of Sumter, in the County of Sumter and State of South Carolina, to the City of Columbia, in the County of Richland and State of South Carolina.

4. That the defendant, S. B. Divine, is a citizen of the State of South Carolina, who was at the times hereinafter mentioned a servant and employee of the defendant, Atlantic Coast Line Railroad Company, being engineer, engaged in running an engine of the defendant used for switching and other purposes on defendant's yard at said Sumter.

5. On information and belief, that on or about the 19th day of December, 1910, while plaintiff's intestate was crossing Harvin street, a public street of the said City of Sumter, defendant, Atlantic Coast Line Railroad Company, carelessly, negligently, recklessly, wilfully and wantonly ran backwards one of its engines and tender on one of its tracks across said Harvin street, at an excessive and reckless rate of speed and in violation of its own rules and regulations as to speed, and without having any one on the rear of said engine or tender to keep a lookout in the direction in which said engine and tender were being run, and in violation of its own rules, and without blowing the whistle or ringing the bell of said engine, and without giving any signal or warning whatever of its approach as required by law, although where the tracks of said defendant cross said
4 Harvin street is a public crossing in said City of Sumter, and carelessly, negligently, recklessly, wilfully and wantonly ran into and over plaintiff's intestate, crushing him beneath the wheels of said tender and causing his death.

6. On information and belief, that the defendant, Atlantic Coast Line Railroad Company, knew or should have known, that its co-defendant, S. B. Divine, was a careless and reckless engineer, nevertheless, it carelessly, negligently, recklessly, wilfully and wantonly retained the said S. B. Divine in its employ as switch engineer in and about its yards at said Sumter, South Carolina.

7. On information and belief, that the defendant, S. B. Divine, who was engineer on said engine of the defendant, Atlantic Coast Line Railroad Company, which was run into and upon plaintiff's intestate, crushing him beneath the wheels of the tender of the said engine, was guilty of carelessness, negligence, recklessness, wilfulness and wantonness, in that he ran said engine at a reckless rate of speed within the yard limits of defendant, Atlantic Coast Line Railroad Company, in the said City of Sumter, and in violation of the

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rules of said company, across said Harvin street, without keeping a lookout in the direction in which said engine and tender were being run backwards, as provided by the rules of said company, and in that he failed and neglected to ring the bell or blow the whistle of said engine in approaching said public crossing at Harvin street and failed to give any signal or warning whatever as required by law; and in that he carelessly, negligently, recklessly, wilfully and wantonly failed to stop said engine and tender when he saw, or should have seen, that the plaintiff's intestate would be run into and over if the said engine and tender were not stopped.

8. On information and belief, that by reason of the joint and concurrent carelessness, negligence, recklessness, wilfulness and wantonness of the said defendant, Atlantic Coast Line Railroad Company, and the said defendant, S. B. Divine, as hereinabove related, the said tender of the said switch engine was run into and upon plaintiff's intestate, crushing him beneath the wheels of the said tender and causing his death.

9. That by reason of the death of said John J. Mims, caused as aforesaid by the joint and concurrent carelessness, negligence, recklessness, wilfulness and wantonness of the defendants, Atlantic Coast Line Railroad Company and S. B. Divine, his widow, Lizzie M. Mims, and his four minor children, James Hobson Mims, Lola May Mims, Eva Gertrude Mims and Ada Elizabeth Mims have suffered great and grevious loss, have been deprived of their support and comfort, have been deprived of the society and companionship of their husband and father, have suffered great grief and mental anguish and have been rendered dependent upon the charity and protection of relatives, all to their damages the sum of sixty thousand ($60,000.00) dollars.

Wherefore, plaintiff prays judgment against the defendants for the sum of sixty thousand ($60,000.00) dollars, and for the costs and disbursements of this action.

Columbia, S. C., April 5th, 1911.

(Duly verified.)

Answer (*S. B. Divine's Answer Similar*).

The defendant, Atlantic Coast Line Railroad Company, answering the complaint herein,

For a First Defense.

1. Admits so much of paragraph one thereof as alleges the death of John J. Mims on December 19th, 1910, but has no knowledge or information sufficient to form a belief as to the remaining allegations of said paragraph.

2. Has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph two thereof.

3. Admits the allegations contained in paragraphs three and four thereof, and so much of paragraph five thereof as alleges that John

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J. Mims was killed by one of this defendant's engines at Sumte South Carolina, on the 19th day of December, 1910.

4. Denies each and every allegation contained in said complai not hereinbefore specifically admitted or as to which lack of know edge and information has not been alleged.

For a Second Defense.

Alleges that the injury to and death of John J. Mims were d to the negligence of the said John J. Mims in crossing, or attemp ing to cross this defendant's track, knowing of the presence of trai and engines constantly passing, without exercising any, or exerci ing insufficient precaution, by maintaining a lookout and otherwis to prevent injury to himself; in failing to look and listen for t approach of a train or engine before attempting to cross this d fendant's track; in failing to hear and heed the noise of the a proaching engine, and in failing to hear and heed the signals giv for the purpose of warning him, the said John J. Mims, from t track; that such negligence on the part of the said John J. Mim combining and concurring with the supposed acts of negligence the part of defendants, contributed to the accident and death of t said John J. Mims as a proximate cause thereof, without which t same would not have occurred.

For a Third Defense.

Alleges that the injury to and death of John J. Mims we
7 due to the gross negligence and wilfulness of the said Joh J. Mims in crossing or attempting to cross this defendant track, knowing of the presence of trains and engines constantly pas ing, without exercising any, or exercising insufficient precaution maintaining a lookout and otherwise, to prevent injury to himsel in failing to look and listen for the approach of a train or engi before attempting to cross this defendant's track; in failing to he and heed the noise of the approaching engine, and in failing hear and heed the signals given for the purpose of warning hi the said John J. Mims, from the track; that such negligence an wilfulness on the part of the said John J. Mims, combining and co curring with the supposed acts of negligence on the part of t defendants, contributed to the accident and death of the said Joh J. Mims as a proximate cause thereof, without which the same woul not have occurred.

Wherefore this defendant prays that the complaint herein be di missed with costs.

(Duly verified.)

On the first trial of this case judgment was reversed by the S preme Court. The answer contained the first two defenses set u The third defense of gross contributory negligence and wilfulne on the part of the plaintiff is the amendment allowed by the Cou upon motion of the defendants when the second trial was begun.

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Testimony and Judge's Charge.

Appearances:

For the Plaintiff: Messrs. Nelson, Nelson & Gettys and J. H. Clifton.

For the Defendant: Messrs. Barron & McKay, P. A. Willcox, L. W. McLemore.

8 Mr. McKay: We served motion to amend the pleadings. I will pass the original up to your Honor. I will state the proposed amendment. This cause of action is brought alleging injuries on a highway crossing. Inadvertently counsel failed, counsel for the defendants failed to plead gross and wilful contributory negligence. Contributory negligence, however, was regularly pleaded. We amend the pleadings now by adding another defense in which gross negligence and wilfulness on the part of the deceased is pleaded. We think under the decisions we have the right to make that motion at this time.

Mr. Nelson: It is a matter in your Honor's discretion to allow the amendment, but we feel under the case of Crossby vs. R. R. that the amendment comes too late, and does set up an additional defense, the defense of gross wilful neglect on the part of the defendant.

(Argued.)

The Court: I suppose the amendment will have to be allowed.

Pleadings read.

Mrs. Lizzie M. Craig (white), sworn, says:

Mr. Clifton:

Q. You are the wife of the late John J. Mims?
A. Yes, sir.
Q. Where did he live?
A. Sumter, S. C.
Q. He died there?
A. Yes, sir.
Q. How many children did he leave?
A. Four.
Q. What are their names?
A. Ada Elizabeth, Eva Gertrude, Lola May Mims, James Hobson.
Q. They at that time were under twelve or thirteen years of age, weren't they?
A. Yes, sir.
Q. How young is the youngest one now?
A. Six years of age.
9 Q. At that time three or four years old?
A. Three at that time.
Q. These are the children sitting over here?
A. Yes, sir.
Q. Where are the other children?
A. At home.

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Q. Where was your husband employed and whereabouts time of his death?
A. Sumter, S. C.
Q. Employed there by the Railroad Company?
A. Yes, sir.
Q. He died where, at the hospital?
A. At the hospital in Sumter.
Q. He died about Dec. 19th, 1910?
A. Yes, sir.
Q. When did he die?
A. Something after nine o'clock.
Q. Not the time he was hurt, but the time he died?
A. Something about eleven o'clock, or twelve o'clock.
Q. He was hurt somewhere after nine o'clock and die eleven?
A. Yes, sir.
Q. Were you at the hospital when he died?
A. Yes, sir.
Q. They carried him back home and you did the best yo for him?
A. Yes, sir.
Q. He was employed by the Coast Line Company at the his death?
A. Yes, sir.
Q. About how old was he?
A. Thirty-six.
Q. How long had he been working for the Coast Line Co
A. Three or four months.
Q. Before this where had he worked?
A. Telephone shop in Sumter, S. C.
Q. At the time of his death how much money was he ear the month?
A. I think $42.00 a month.
Q. He was getting $42.00 at the time of his death?
A. Yes, sir.
Q. Well, now, you were living in Sumter at the time of his
A. Yes, sir.
Q. After his death you moved over here?
A. Yes, sir.
Q. Where are you living now?
A. Brookland, Lexington County.
Q. You were a Mims and married Mr. Mims?
A. Yes, sir.
Q. You are a sister of Sam Mims?
A. Yes, sir.
Q. You now live in Brookland, Lexington County?
A. Yes, sir.
Q. After his death were you compelled to come here to g to try to support yourself and children?
A. Yes sir; I moved here and went to work.
Q. In the cotton mill?

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A. Yes, sir.
Q. Was he, Mr. Mims, in good health at the time of his death?
A. Yes, sir, his health was as well as common; he had been sick some time back with a little grippe.
Q. Outside of that was his general health good?
A. Yes, sir.
Q. Before the death of your husband you kept house, I suppose?
A. Yes, sir.
Q. You did not have to work at that time?
A. No, sir.
Q. Since his death you have been compelled to work for yourself and children?
A. Yes, sir.
Q. I believe you have married since, what is the name of the gentleman you married, Mr. Craig?
A. Mr. Craig.
Q. Since his death you have been compelled to work and take care of yourself and children?
A. Yes, sir.
Q. Are you still working?
A. Yes, sir.
Q. Whereabouts?
A. In the Duck Mill.
Q. You have been working there since the death of your husband, Mr. Mims?
A. Yes, sir; since his death I have been working.
Q. Where does Mr. Craig work?
A. In the railroad, Southern, at Cayce, section foreman.
Q. Section foreman for the Southern?
A. Yes, sir.
Q. You work and he works?
A. Yes, sir.
Q. It takes the combined effort of you all to keep going?
A. Yes, sir.

11 Cross-examination:

Q. When were you married to Mr. Craig?
A. December a year ago.
Q. December, 1912?
A. Yes, sir.
Q. What is his position with the Southern Railroad at Cayce?
A. Section foreman.
Q. How much does he make per month?
A. Fifty-two dollars.
Q. You live with him in Brookland?
A. Yes, sir.
Q. I believe you testified that your husband, John J. Mims, was making how much per month as car inspector in Sumter?
A. Forty-two dollars, I think, if I am not mistaken.
Q. You are still working in the Duck Mill?
A. Yes, sir.

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Q. What Duck Mill?
A. Columbia.
Q. Columbia Mill?
A. Yes, sir.
Q. Your husband, Mr. Mims, was not deaf?
A. No, sir; he was not deaf.
Q. He had good hearing?
A. Yes, sir.

Redirect examination:

Q. Mr. Divine, the engineer, was not blind?
A. No, sir.
Q. Your second husband has got how many children by some other wife?
A. Five.
Q. He was a widower and you a widow?
A. Yes, sir.
Q. You had four and he had five?
A. Yes, sir.

Mr. J. J. DUNLAP (white), sworn, says:

Mr. Clifton:

Q. On the 19th of December, 1910, were you in the employment of the Coast Line Company?
A. Yes, sir.
Q. At Sumter, you run out of there?
A. Yes, sir.
Q. What was your run?
A. Sumter to Robbins.
12 Q. What was the number of your train?
A. 331 on this morning.
Q. You went from Sumter to Robbins?
A. Yes, sir.
Q. About what time of the morning did you leave Sumter on that run, what was your leaving time?
A. Leaving time was seven o'clock, I believe, at that time, but we were late that morning.
Q. About what time were you leaving Sumter on this particular morning, between nine and ten?
A. About 9:30.
Q. Just about the time the train from Orangeburg was coming in?
A. We had to wait at Sumter on the train to leave.
Q. Called forty-six?
A. Yes, sir.
Q. The route of that was from Orangeburg, Sumter, by Lanes to Florence and back to Florence, called the "shoe-fly?"
A. Yes, sir.
Q. Runs around there?
A. Yes, sir.

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Q. That is correct?
A. Yes, sir.
Q. You were leaving, just pulling out?
A. Yes, sir; freight train.
Q. Did you see anything of Mr. Mims?
A. Yes, sir; I saw him coming up the side of the track that Divine was coming down with a switch engine.
Q. You know Mr. Divine?
A. Yes, sir.
Q. I believe he has good eyes?
A. Yes, sir, good sight.
Q. You saw Mr. Mims at what point?
A. Few feet before you reach the crossing, and he started across the track, and that time Divine's engine appeared, and he jerked the whistle three or four times right quick, that time hit Mr. Mims.
Q. Was the whistling and the striking of Mr. Mims about the same time?
A. Not over five or eight seconds apart.
Q. Practically at the same time?
A. He jerked the whistle, that time he struck.
Q. Mr. Mims was going in the direction of 46, Orangeburg train?
A. Yes, sir; he was headed across that way.
Q. Going that way to inspect the train?
A. I suppose so.
Q. That was his duty?
A. Yes, sir.
Q. His business was to inspect the train on its arrival?
A. Yes, sir.
Q. He was going in that direction for the purpose of inspecting the train?
A. Yes, sir.
Q. About what rate of speed was the engine Mr. Divine was running, at what rate of speed was it making at the time it struck Mr. Mims?
A. About seven or eight miles an hour when he struck.
Q. Did you make a statement of it to the railroad company?
A. Yes, sir.
Q. You were working for them at that time?
A. Yes, sir.
Q. Did or not Mr. Divine in going from the Manning street crossing to the Harvin street, did he give signal other than about the time he struck Mr. Mims, the sudden alarm?
A. I could not have heard anything until he got to that point; heard the whistle just before he struck.
Q. Other than the time he struck him?
A. No, sir.
Q. That was the only time he blew?
A. I did not hear anything except that.
Q. Mr Mims was walking with his side toward Mr. Divine?

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A. Walking with his side, the engine coming this way, and he was coming across this way.
Q. Had you seen Mr. Mims earlier in the day?
A. No, sir; I think that was the first time I seen him that morning.
Q. This was at the Harvin street crossing?
A. Yes, sir.
Q. Pretty well traveled place from Harvin street?
A. Yes, sir.
Q. How many tracks were there crossing Harvin street at that time?
A. Four, I believe.
Q. There are more at this time?
A. I do not know, I have not been in Sumter in two years.
14 Q. What kind of engine was Mr. Divine running?
A. Switch engine.
Q. Shifting?
A. Yes, sir.
Q. Any cars attached to it?
A. No, sir.
Q. Was he running backward or forward?
A. Running backward.
Q. The tender going ahead?
A. Yes, sir.
Q. The tender was sloping, he could have seen anything ahead of him?
A. Yes, sir, all switch engines have sloping tenders.
Q. For that purpose, for the engineer to see ahead?
A. Yes, sir.
Q. This one was that way?
A. Yes, sir.
Q. What was the number of the switch engine, do you remember?
A. 1176, I think.
Q. Was anybody on the back of the switch engine, on the step?
A. No, sir.
Q. Nobody there to keep any lookout, or to give warning of any kind?
A. Was nobody on it when I saw the engine.
Q. Not on the steps?
A. No, sir.
Q. How many people compose the switch crew ordinarily?
A. Five.
Q. The engineer, fireman—who are the others?
A. Switchman, brakeman and conductor.
Q. See if this is a copy of the company's rules in force at that time?
A. Yes, sir.

Mr. Clifton: We offer the whole book of rules in evidence.
Mr. McKay: We do not think the whole book is relevant.

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Mr. Clifton: We offer a compendium of them at this time, and l point out the ones we want.

Q. At the time Mr. Mims was struck did he first look one direc-n, then in another, and apparently taken by surprise——

Mr. McKay: We do not like to make what might look to be useless objections, but counsel's whole method of examination is leading.

The Court: Pretty leading.

Mr. Clifton: Say how he did; what did he do immediately succeeding the alarm that Divine made?

A. He just looked around excitedly for a moment; all of it happened in a minute.

Q. Did he appear to be startled?

A. Looked that way; about that time the engine hit him on the ow, struck him here, and that hid him from my view. I was ssing from the other direction from him. I jumped to run across crossing. I met Mr. Divine. That time, I think two negroes Mr. Mims in their arms.

Q. What direction did Mr. Mims look first?

A. Straight ahead toward me.

Q. Then looked in some other direction?

A. He didn't have much time, just looked that way, startled like; hat time he hit him.

Q. Was that on Harvin street where he was struck?

A. Yes, sir, on Harvin street.

Q. Do you know if he was dragged; do you know how far he was gged?

A. I do not think he could have been over four or five feet. I do think but one truck passed over him.

Q. Did you see him after he was taken from under the train?

A. Yes, sir.

Q. What was his condition?

A. Leg cut in two, mashed badly.

Q. Both or one leg?

A. Both legs, looked to me like; I only stayed there a second or looked at him. He said, "Oh, Lord, what are my wife and chil- going to do?" I got back on my engine and left.

Q. Both of his legs were mashed, crushed?

A. Looked to me both that way; I did not go right up to him.

Q. How far is it from Harvin street crossing to the Manning avenue crossing, your best judgment?

A. 150 yards, something like that.

Q. Mr. Divine was the engineer in charge of this shifter?

A. Yes, sir.

Q. You say he was running at about what rate of speed?

A. When he struck Mr. Mims about seven or eight miles an hour.

Q. Just before he struck him?

A. Yes, sir, in a couple of seconds.

Q. A few seconds before striking him, what rate was he running?

A. There was some cars on the track between me and him. I

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could not see the engine, could only see the stack going by; I did not pay attention, looked like he was slowing up as he approached the crossing.

Q. At the time he struck Mr. Mims, had he slowed up a little?

A. Yes, sir, he had slowed up I think.

Q. Prior to that time, coming from the general direction of Manning avenue crossing and beyond, at what rate of speed was he running, your best judgment?

A. The best I could judge he must have been running ten miles an hour, something like that; a little faster than he was when he struck Mr. Mims.

Cross-examination.

Mr. McKay:

Q. You were engineer on what train?

A. 331, local freight.

Q. How far were you from the point of this accident?

A. About from here to the door yonder, or a little further.

Q. They have asked you something in regard to the signals. You testified at the last trial you could not have heard the bell of Mr. Mims' engine ringing?

A. Mr. Divine's engine; not between the two crossings I could not have heard the bell, I don't think.

Q. You were starting at that time?

A. Yes, sir; I had been waiting on 46 to pull from the
17–26 tank. The coaches overlapped the one I was in. As soon as we cleared I started my engine out.

* * * * * * *

27 HUNTER HODGE (white), sworn, says:

Mr. Clifton:

Q. On or about 19th December, 1910, were you in the employ of the Coast Line?

A. Yes, sir.

Q. What was your position?

A. Car inspector.

28–30 Q. Did you know John J. Mims?

A. Yes, sir.

Q. Did he ever work for them?

A. Yes, sir.

Q. What was his work?

A. Car inspector.

Q. Day or night?

A. Daytime.

Q. What is the number of the train coming in from Orangeburg 9:30?

A. 46.

Q. And 47 the other way?

A. Yes, sir.

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Q. Tell the jury whether it was the duty of Mr. Mims to inspect the Orangeburg train on its arrival?
A. At that time, I suppose. It was the duty of the car inspector when a train come in to inspect it.
Q. Was or not Mr. Mims day inspector at that time?
A. Yes, sir.
Q. You say it was his duty to inspect the train when it came in?
A. Yes, sir.
Q. When was the Gibson train inspected?
A. I don't know.
Q. Customarily?
A. It always came in the evening and the night man inspected that.

(No cross-examination.)

* * * * * * *

31 H. G. McKAGEN (white), sworn, says:

Mr. Clifton:

Q. You are an officer of the police force in Sumter?
A. I am.
Q. And have been for how long?
A. Coming January, seven years.
Q. You were an officer on the day of the death of Mr. Mims?
A. Yes, sir; I am an officer of the City of Sumter, sergeant of the force, day work.
Q. Have you been more or less assigned to the passenger station for meeting trains?
A. I do day work, I am assigned to meet all day trains from 7 o'clock until 7:30 and 8 o'clock at night.
Q. Were you at the station on the 19th December, the day of the death of Mr. Mims?
A. Yes, sir; at the passenger station.
Q. Were you at the Manning crossing at any time?
A. I was at the passenger station. I rode down between the tracks.
Q. Riding between the tracks, going to Manning avenue, did you see Mr. Mims?
A. I did.
Q. Where was he?
A. He was leaning against the Bishopville train, called the Darlington-Bishopville train, ready to go out after the Charleston came in going to Columbia. I was passing by. Mr. Mims was leaning against the rod of the engine, Darlington-Gibson train. I spoke to him as I passed by.

32 Q. He was leaning against the rod of the Gibson train?
A. Yes, sir. I was going to Manning avenue.
Q. Why were you going there?
A. I was going there to see, it is a big public crossing, I went to see if everything was clear.

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Q. Did you see Joe Pringle?
A. The old watchman, Joe Pringle.
Q. While standing there what else did you observe?
A. I saw Mr. Divine coming with his engine, going toward the passenger station, going east.
Q. Did he cross over Manning avenue while you were there?
A. He did.
Q. At what rate of speed was he going when he passed Manning avenue?
A. To the best of my knowledge he was going between 15 and 16 miles an hour.
Q. What was he running?
A. Switch engine.
Q. Anything attached to it?
A. Nothing, except the tender; he was running backwards.
Q. How far from Manning avenue to Harvin street?
A. Between 140 and 150 yards from where I was standing on Manning avenue to where, just about where Mr. Mims was struck.
Q. In passing Manning avenue tell the jury whether the bell rung or whistle sounded?
A. No, sir; was no sound of the bell or whistle either.
Q. Was any signal of any kind given as far as you saw?
A. None whatever; I was from here to you probably from Mr. Divine on the engine; he waved at me when passing.
Q. Anybody on the steps in front of the engine, going back?
A. No, nothing on the back, he was backing back.
Q. Ain't there a step back there?
A. Yes, sir.
Q. Anybody on there?
A. No, sir.
Q. You saw Mr. Divine himself?
A. I did.
Q. And you state he was going 15 or 16 miles an hour?
A. Yes.
33 Q. Tell whether or not that is a public crossing much or little used?
A. Most thorough traveled crossing in the city.
Q. How about Harvin street crossing?
A. Not as much as Manning, but it is a big public crossing at Harvin.
Q. Between 9 and 10 o'clock in the morning at Sumter, is that a busy hour for trains?
A. Yes, sir, very busy.
Q. How about the number?
A. All passenger trains come in there, four or five trains in about half an hour.
Q. What about the number of people?
A. Always a great crowd at the passenger station in Sumter.
Q. Was there a big crowd on this morning in question?
A. As much so as ordinary.

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. What attracted your attention, if anything, to the engine after
ng you, after it passed Manning avenue, going to the depot?
. I was getting ready to ride back to the depot.
. In the same direction the engine had gone?
. Yes, sir.
. Could you see the engine from the time it passed you until it
o Harvin street?
. Yes, sir; nothing to keep me from seeing it.
. What took place; what did you see occur at Harvin?
. As I was fixing to get on my wheel, Joe Pringle, the watchman,
"Look out——"

r. McKay: We object.

r. Clifton: You cannot say what he said. Was your attention
cted by a remark from Joe Pringle?
. Yes, sir.
. What did you do in consequence of having your attention at-
ed?
I looked quick, I heard the whistle go toot, toot; I saw some one
r the wheel; I put speed to my wheel; I got there, they were
t getting him from under the wheel; I helped to kind of
straighten him out; I found it was John Mims.

Q. Did you try to talk to him?

A. I tried to get him to talk to me; he was going on in
a terrible way and agony, all broke up: he said, "Oh, my God,
ny God; I want my wife and children;" that way. I could not
nything out of him at all.

. Your attention was arrested, or called to your mind by Joe
gle, and you heard the sudden alarm?
. Yes, sir.
. And looked and saw somebody under the wheels of the engine?
. Yes, sir.
. About where was Mr. Mims, about what point in the street was
Mims taken from under the engine?
He was about the clearance pole, where the engine was stand-
the clearance post is a little post put there for bicycle riding,
biting people riding there; I had authority to ride through
by the railroad; I always done what I could for the railroad,
vill now. The clearance pole was there, and Mr. Mims looked
from where I was standing, I could not tell exactly, looked to
e was struck about little in front of the clearance pole, or about
where the pole is, where he had walked up.
. At or near the edge of the sidewalk?
The sidewalk did not come right straight down to that track,
s kind of catter-cornered on down; here's the sidewalk, should
across here; here's the clearance pole, curve going across Man-
avenue.
. How far into the street was Mr. Mims' body at the time he was
from the engine?
About 15 or 16 feet, may be 20 feet.
. That is your best judgment?
That is my best judgment.

SE IN CENTER

Q. Were you there when Mr. Parrott came there?
A. Yes, sir; I was there ahead of Mr. Parrott.
Q. Were you there when Mr. Parrott left?
A. Yes, sir.
Q. You heard all Mr. Mims said from the time you
35 there until he was moved away?
A. I only heard him moaning; he seemed to be alm
unconscious.
Q. Did he say anything else?
A. Not to my hearing.
Q. You were there all the time?
A. Certainly.
Q. Did you help to move him?
A. No, I did not help to lift him; several caught hold of him.
Q. How was he carried away?
A. Carried away, put something under him.
Q. Stretcher?
A. I don't remember whether board or stretcher.
Q. Was he carried away in a wagon, or what?
A. In a wagon; the trains were blowing when taking him, an
had to go back to the station.
Q. Up to the time he was carried away, and up to the time y
left, you heard all he had to say?
A. Up to the time I left.
Q. Had Mr. Parrott left before you or not?
A. No, Mr. Parrott was going; I think his automobile was abo
may be from here to that door from the crossing.
Q. Had he gone back to his automobile before you left?
A. He was fixing to go.
Q. Back to his automobile?
A. Yes, sir.
Q. Did Mr. Mims say anything else beyond what you have sai
A. I did not hear him.
Q. Did he say anything else?
A. No, sir.
Q. You heard all he said?
A. Yes, sir.
Q. And you have said what he said?
A. Yes, sir; I tried my best to get him to talk; I have known hi
for years and years; known him to be a mighty good boy.
Q. Did you say anything to Mr. Divine?
A. Yes, sir.
Q. Did you tell Mr. Divine that you had spoken to him abo
running his train at a rapid rate——

Mr. McKay: We object.
Mr. Clifton: Wait until I ask the question.
The Court: I can not rule on it until he asks the question.

36 Mr. Clifton: Did you see Mr. Devine there?
A. Yes, sir; I did.
Q. Did you have any conversation with him?

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A. I had a few words with him.

Q. Did you or not there state to Mr. Devine that you had already warned him about his fast running, and that at the time he crossed Manning crossing Joe Pringle called your attention, and said he was going to kill somebody——

Mr. McKay: We object.

Mr. Clifton: State the conversation you had.

Mr. McKay: We object.

The Court: What is the objection?

Mr. McKay: He is attempting to bring in a conversation had through this witness and another man at Manning crossing.

The Court: He is seeking to bring in a conversation between one of the defendants and this witness; that is admissible.

Mr. McKay: It is not proper for him to put words in this witness' mouth, and bring out the fact that there was some prior conversation between this witness and some disinterested third party.

Mr. Nelson: We have not brought out a third party.

The Court: Any conversation between one of the defendants and the witness, right there upon the scene, is admissible. Let him state the conversation. (Exception noted.)

Mr. Clifton: What was the conversation you had with Mr. Devine at Harven street?

A. Mr. Devine spoke very sympathetically about the young man being hurt. I said Captain that is caused from that fast schedule; you blew your whistle too late; he said, what have you got to do with it; I said nothing, only I have the right to tell you I think you did blow your whistle too late; I think you ought to have blown your whistle in time, and not run so fast; you did run too fast; he seemed to be vexed about it.

37 Q. He is an excitable man?

A. Yes, sir; I know he is; he and I always have been good friends up to that time.

Q. Prior to the time he killed Mr. Mims had you ever warned him about his fast running?

A. On one or two occasions I did, from complaints made to me.

Q. Did you state to Mr. Devine that complaints had been made.

A. I told him one or two had complained.

Q. Who?

A. Mr. Rittenburg is one; he runs the warehouse.

Q. At what point?

A. Manning is here, on the left hand side.

Q. How near these tracks in question?

A. Warehouse on the track on one side, and the other track on this side.

Q. How many times had you spoken to Mr. Devine, how many times had you warned Mr. Devine before, to the best of your recollection?

A. On two or three occasions.

Q. In the conversation you had with——

CLOSE IN CENTER

A. I will tell you, Rittenburg himself told me——

Mr. Clifton: You can not say what Mr. Rittenburg told you. you inform Mr. Divine what Mr. Rittenburg had told you?

A. Yes, sir.

Q. What was it?

A. No; I did not inform Mr. Devine.

Q. Did you go to Mr. Devine in consequence of what Mr. Ri burg told you?

A. Yes, sir; not only for that, I notified him on my own resp bility. Since, this company has reduced the speed to four mil hour.

Mr. McKay: We object.

The Court: You can not state that.

Mr. Clifton: You had warned Mr. Devine some two or three ti

A. I did.

Q. On the day you had this conversation with him, at what pl

A. You mean the day of the killing?

Q. Yes?

A. He came up to the passenger station afterwards, a half an hour or hour after; he said, "I understand you
38 I was running 15 or 20 miles an hour;" I said, "I did, I say so now, and you were running that fast;" he said was not running that fast; I was running a little fast, but not fast;" and he said I was mistaken about it; he said it was a m of opinion.

Q. Did you have any other conversation with him?

A. No, sir; he was mad with me then, and did not speak to any more until——

Mr. Clifton: Never mind that. Have you seen Mr. Devine ning up and down the yard frequently?

A. Yes, sir.

Q. How does he run, fast, slow or what?

A. I am constantly down that side of the town; I collect ta I was detailed for the work, to look out for trains crossing tr and keep them open.

Q. How does he run?

A. Mr. Devine runs fast, always did.

Q. Even after you warned him?

A. He said we didn't have any law to that effect. I thought had law——

Q. Do you know how many times he has been laid off, Mr. Dev for carelessness?

A. On several occasions.

Q. These shifting engines, do they or not have steps on each of it?

A. Yes, sir.

Q. When it passed Manning crossing was anybody on the s in front going back—I mean on the back, anybody there?

A. A colored man standing on the front of it.

Q. You mean up front where the headlight is?

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A. Yes, sir.
Q. I am talking about the tender of the engine, anybody there?
A. No, sir; not a soul on there.
Q. How was it running?
A. Backwards.

Cross-examination by Mr. McKay:

Q. You say Mr. Divine has been laid off several times?
A. Yes, sir.
Q. Have you ever been laid off?
—. I.
39 Q. I ask you that question?
A. No, never have until of late.
Q. You have been laid off then?
A. Yes, sir.
Q. Have been under suspension?
A. Yes, sir.
Q. Are you under suspension now?
A. Yes, sir; the other day——
Q. I have no desire to bring out why?
A. I was suspended because I would not make an apology to anybody.

Mr. Clifton: We will allow you time to answer.

Mr. McKay: You were at Manning crossing on this morning?
A. Yes.
Q. You witnessed this catastrophe from Manning avenue?
A. When Mr. Devine struck Mr. Mims?
Q. Yes?
A. Yes, I was looking down the track.
Q. You were right close to the track?
A. Yes.
Q. You saw it from the rear, you saw the whole thing from the rear; the engine was going away from you?
A. Yes.
Q. You were looking at it from a point behind the accident?
A. Yes; Mr. Mims, however, was not behind the engine; you can see 140 yards away easy; if you will look at that track you will see how distinctly you can see.
Q. You were behind the accident when it occurred?
A. Not directly behind the engine; I was going down between the track looking down between the tracks; here's one track where the Bishopville engine was on, and here is the one Mr. Devine was on; here is the opening here.
Q. You were between the tracks?
A. Yes.
Q. What is the distance to Harvin street?
A. Between 140 and 150 yards.
Q. By the time you had ridden up there they had got this man from under the engine?
A. They were getting him from under the engine.

CLOSE IN CENTER

Q. Lifting him out?
A. Yes, sir.
Q. You were on your wheel, and went up there at the t
A. Yes, sir.
Q. You were getting on your wheel about the time it happene
A. Yes, just about the time—I was looking down; I went t on the wheel, I heard toot, toot.
Q. What attracted your attention was the blowing of the whi
A. As I looked I heard toot, toot; I saw some one jerk ov could not say whether he was under the wheel or rod, some one jerking over that way, on the side between the Gibson en and——
Q. You testified you did not tell Mr. Mims that Mr. Ritten had complained about it?
A. I did not tell Mr. Mims anything about that.
Q. I mean Mr. Devine?
A. Not that I remember; I don't think I did.
Q. Are you positive of that?
A. No, I will not be positive.
Q. You would not deny you said you had told him that, a last trial?
A. No, I could not say what I did; I don't remember.
Q. You are positive Mr. Rittenburg complained to you when went to Mr. Mims?
A. Yes, sir.
Q. I mean Mr. Devine?
A. I understand. We talked about it. Mr. Rittenburg sa had done the right thing on that.
Q. Never mind what Mr. Rittenburg said.

Redirect examination:

Q. Now, you can make an explanation of your suspension?
A. I would like to make it. On the evening of Thanksgi parade there was some misunderstanding, some words said; I suggesting how the officers should ride; I was second serge thought I had the right to make the suggestion; I sugg
41–48 to one or two officers, and the chief, I said first and se sergeant ride together—first and second and third and fo sergeant, on down the ranks, we all should ride out together; Chief of Sumter is a pretty hard-headed fellow, he talks rapidly uses profanity a good deal—mighty good man, but that is his f he says God damn it, he says——
Q. Make it brief.
A. I said "don't make a durn bit of difference to me wher ride; I can ride any damn place, that way."
Q. Is that the cause of it?
A. Yes, sir.

Mr. Clifton: That will do?

A. They wanted me to make an apology; and if I would n an apology it would be all right; I said I would not, I had not

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to apologize for; I said to the chief if he would apologize to me I would to him, or his hair would turn gray before I would to him; he said he would suspend me unless I apologized to him tomorrow; I said you can call me suspended right now; I meant it, too.

* * * * * * *

49 Mr. Willcox: We make this statement to the Court: The plaintiff has proven in evidence that when killed the deceased Mims was in the act of going to the inspection of train 46, in pursurance of his duty to that end; and the defendant will preface its offer of evidence to show that train 46 was a train engaged in interstate commerce, and the deceased was in this respect and otherwise engaged in interstate commerce. And to show that the statute under which they brought, the administratrix brought her case of action, has been superseded by Act of Congress of the United States, known as the Federal Employers' Liability Act.

The Court: I think Judge Smith has decided against you on that.

Mr. Willcox: We do not think so.

The Court: Wasn't that made in a case at Barnwell?

Mr. Willcox: Not on the point we are making now. We are not making any motion, but we do wish to protest against the introduction of this testimony for what it is worth, and will raise the question at a later time.

50 Mr. Nelson: What is our friend's object in making that statement now.

The Court: There is no question presented to the Court.

Mr. Nelson: To advise us or the Court?

Mr. Willcox: To advise ourselves.

Mr. Nelson: If he makes that statement for our benefit we have already anticipated it, and looked into it thoroughly.

Mr. Willcox: I hand the Court and the stenographer this statement for incorporation in the record:

"The plaintiff has proven in evidence that when killed the deceased Mims was in the act of going to the inspection of train No. 46 in pursuance of his duty to that end. The defendant will preface the offer of evidence to show that train No. 46 was a train engaged in interstate commerce and that the deceased Mims was in this respect and otherwise engaged in interstate commerce—with the statement that such evidence is introduced solely for the purpose of showing that the statute or law under which plaintiff has brought her action has been superseded, as will be shown by the facts of this case, by the Act of the Congress of the United States known as the Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65 C., 149."

W. B. Pryor (white), sworn, says:

Q. Mr. Pryor, what was your position with the Atlantic Coast Line in December, '10, when Mr. Mims was killed?

A. Employed as train dispatcher.

Q. As train dispatcher, what were your duties?

A. To issue orders for moving of trains; issue train orders to expedite the movement of trains.

CLOSE IN CENTER

Q. What record did you keep?

A. We have train sheet and order book.

51 Q. State whether or not you controlled the movement of trains between certain points?

A. Between Florence and Columbia, Florence and Augusta.

Q. Is that your original record of the movement of trains on the morning of this accident?

A. It is my record for December, '10.

Q. What were your orders for the movement——

Mr. Clifton: Did he keep the record?

A. Yes, sir.

Mr. Clifton: These are his entries?

A. Yes, sir.

Mr. Nelson: You- handwriting

A. From 8 o'clock in the morning until 4 in the afternoon.

Mr. McKay: What does your record show—the movement of trains at Sumter, S. C.?

A. Yes, sir.

Q. State whether or not there were any trains at Sumter during the period of your work that day that came from out of the State of South Carolina into this State, or that were going out of the State of South Carolina into another State?

Mr. Clifton: We object, for the purpose of saving what rights we have; no such plea set up by the answer.

The Court: That has no place in this case, interstate commerce, can not cut the State Court out of jurisdiction to try this case. We would have no State Court at all, if followed that thing up.

Mr. Willcox: It has been held by the U. S. Supreme Court that it does not have to be pleaded. The objection is, I understand, this is not a question responsive to the allegations of the complaint, because it has not been pleaded.

The Court: Was this admitted in the last trial?

Mr. Clifton: No; new issue.

Mr. Nelson: We object to its introduction. It is immaterial how many trains came in Florence this morning, whether other

52 intra and interstate trains came in there. The issue is, was train 46, an Orangeburg train which ran from Lane to Orangeburg, to Sumter and to Florence, an interstate train; makes no difference how many other trains, what bearing it has on this particular train he was going to inspect at that time.

The Court: I can not see where it has any bearing on this question; irrelevant and not pleaded, and not brought up as an issue in this case.

Mr. Willcox: Suppose we have a decision that it is not necessary to plead it, but that it can be introduced without pleading it; that is the decision of the U. S. Supreme Court.

The Court: The U. S. Supreme Court does not construe pleadings under the Code, under the South Carolina Code, in South Carolina cases.

Mr. Willcox: Would in this case, where you inject in the case a Federal question, naturally the Supreme Court of the United States

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ld govern the practice and pleadings in this Court, in reference
ıe Federal question.
he Court: You have raised the question; I rule out the evidence.
ıse to occupy my time, and the time of this jury, and incur ex-
se to this county about what I conceive to be irrelevant and im-
per question. You have raised the point; and that ends it.
Ir. Willcox: I am not contending against your ruling. The pur-
of making this prefatory statement was, we were going to offer
ence for a certain purpose, of a certain nature. You have not
nitted us to introduce that evidence, because you say it is incom-
nt.
he Court: I think it irrelevant besides; besides being generally
mpetent, not relevant.
Ir. Willcox: We ask the Court to be allowed to make the state-
t as to the character of the evidence that is ruled out, so we
have in the record the kind of evidence we offer.

The Court: Rather than have the statement incorporated in the evidence, ask the question and I will rule on it, rule on each one separately, if that be necessary; just go ahead ask them.

Ir. Willcox: I can state what we expect to prove by a number of
esses.
Ir. Nelson: We could not consent to that being a part of the
rd.
he Court: No; you will have to examine each one if you want me
ıle on the testimony.
Ir. McKay: State whether or not, from your record, on the morn-
in question there were trains passing through Sumter, Atlantic
st Line, from without the State of South Carolina, and trains
ı within the State of South Carolina, going without the State.
Ir. Clifton: We object.
he Court: Objection sustained.
Ir. McKay: State whether or not that was the case between the
rs of 8 and 10 on the morning of that day——
Ir. Clifton: Same objection.
he Court: Objection sustained.
Ir. Willcox: Come down.

Cross-examination:

Ir. Clifton: This "shoe-fly" train ran from Orangeburg to Sum-
and Lanes and Florence, back to Sumter and back to Orange-
g, didn't it?
. Yes, sir.

. W. CORLEY (white), sworn, says:

. What was your position with the Atlantic Coast Line R. R. on
ember 19, 1910, at Sumter?
. Foreman of the mechanical department.

SE IN CENTER

Q. What was your duty in regard to car inspector?
A. The car inspector was under me.
Q. Directly under you?
A. Yes, sir.
54 Q. Was John J. Mims in your employ?
A. Yes, sir.
Q. Who employed him?
A. I did.
Q. What were the duties of Mr. Mims?
A. To inspect all incoming trains and all outgoing trains out of Sumter.
Q. During what portion of the day?
A. From 7 a. m. to 7 p. m.

(No cross-examination.)

W. E. CLEAPOR (white), sworn, says:

Q. In December, 1910, what was your position with the Atlantic Coast Line at Sumter?
A. Car inspector.
Q. Was Mr. Mims a car inspector along with you?
A. Yes, sir.
Q. Do you remember the Robbins local on this morning?
A. Yes, sir.
Q. State whether or not you and Mr. Mims inspected that train?
A. He did.
Q. When in reference to his accident did he inspect that morning?
A. Some time between 8:30 and 9 o'clock.
Q. Who was in charge of that train, who was the conductor?
A. I don't really know; I think it was Mr. Scott.
Q. Who was the engineer?
A. Mr. Dunlap.

Cross-examination:

Q. That train ran to Robbins, in Aiken County?
A. Yes, sir.
Q. They discharged you recently?
A. No, sir.
Q. You are not working any more?
A. Yes, sir.
Q. Where?
A. For the company. Discharged me in Sumter.
Q. They did discharge you?
A. Discharged me.
Q. And hired you over?
A. No, sir. I was discharged out of one department and hired in another.
55 Q. Kicked you out of one into another?
A. No, sir; I quit one department.
Q. This train went out of Sumter to Robbins, in Aiken County?

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A. Yes, sir.
The Court: You better explain about your transfer of employ-nt.
A. While I was working in December I was working car in-ctor, January, '11, I got released from car inspector, and went work switching on the yard. I switched to February, '12, then as released from there; now working at Florence.
Q. Who released you?
A. Mr. Thorn.
Q. You know you were discharged; what was the cause of your ease?
A. I had some words with the yardmaster.
Q. And he discharged you?
A. I do not know whether it was a discharge.
Q. Did you quit or were you discharged?
A. I reckon you call it discharge.
Mr. McKay: You are now working for the company?
A. Yes, sir.

W. F. FLAKE (white), sworn, says:

Mr. McKay: December, '10, what position did you occupy with Atlantic Coast Line?
A. Flagman.
Q. What train?
A. 331.
Q. Where did that train go?
A. Sumter to Robbins.
Q. What kind of train is it?
A. Local freight.
Q. State whether your duties require you to keep records of cars led by that train.

Mr. Clifton: We object. Irrelevant.
The Court: I do not know what the purpose of it is. Go ahead; ill find out what the object of the evidence is.

A. I do not know whether it was my duty to keep that record, but I did do it; it was the conductor's——
Q. Don't say what he told you.
Mr. McKay: Is that record in your writing?
A. Yes, sir.
Q. Is that the record of the train that morning?
A. Yes, sir.
Q. Was A. C. L. 2082 car in that train that morning?

Mr. Clifton: We object; irrelevant. He was not injured or killed rain going to Robbins.
The Court: Bringing in some interstate commerce; that is ruled irrelevant; nothing to do with the case.
Mr. McKay: Was that car, A. C. L. 2082, a car filled with cotton destined to Augusta on this trip?
Mr. Clifton: Do not answer.

SE IN CENTER

The Court: Irrelevant.
Mr. Douglas McKay: Augusta, Ga.?
Mr. Clifton: Do not answer.
Mr. McKay: Come down.

Q. He was not killed by the Robbins train?
A. No, sir.

CARROLL BROOKS (white), sworn, says:

Mr. McKay: On this morning in December when Mr. Mims was killed at Sumter, what was your position with the Atlantic Coast Line Railroad Company?
A. Conductor.
Q. Of what train?
A. On that day, on December 19, I was running train 46.
Q. State whether or not on that date you carried certain passengers on mileage from Sumter to Lane?

Mr. Clifton: Do not answer. We object.
The Court: Irrelevant; he can not say; that is not a defense for killing Mr. Mims, in any shape or form.
Mr. McKay: Our purpose is to connect this mileage with interstate shipment.
The Court: I exclude it as irrelevant.

57 Mr. Clifton: You were conductor of 46, and the route of your train, is it not, from Orangeburg, Sumter, Lane, Florence, back to Lane, back to Sumter, back to Orangeburg?
A. That was 46 and 47.
Q. And that is the routing of the train?
A. Yes, sir.
Q. Altogether in South Carolina?
A. That is the only train I run by that number.
Q. That route is entirely and altogether in the State of South Carolina?
A. Yes, sir.

D. L. LYNCH (white), sworn, says:

Mr. McKay: On December 19, '10, what was your position with the Atlantic Coast Line Railway Company?
A. I was conductor.
Q. Of what train?
A. Train No. 83.
Q. Where does that train come from?
A. Through train from the North, and I took it from Florence to Savannah, Ga.
Q. Where did that train come from?
A. Through train from New York.
Mr. Clifton: Of your own knowledge?
A. Yes, sir.
Q. Did you come on it?
A. No, sir.

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Mr. Clifton: We object.
The Court: He could not know unless he came on the train. That is under the same head?
Mr. McKay: Yes, sir.

The Court: Ruled out.

Mr. McKay: Where did you take that train to?
A. Savannah.
The Court: The answer is incompetent and irrelevant.

Mr. McKay: State whether or not at Lane, on this day in question, you picked up three passengers, three mileage passengers, and carried them to Savannah, Ga.

Mr. Clifton: The mileage itself would be the best evidence; and, secondly, irrelevant.
58 The Court: One objection is enough; it is irrelevant.
Mr. McKay: You object to this as irrelevant. Have you got your original record with you?
A. My report that day. .

The Court: The original record would not make it relevant.
Mr. McKay: It was objected to on the ground of the record.
The Court: I sustain the objection on the ground of irrelevancy; does not bear in any way on the defense for killing Mr. Mims, as alleged in the complaint, or stated in the answer.
Mr. McKay: Will be necessary for us to formally offer in evidence to get our objection in——
The Court: You can offer it if you want to, of course.

Mr. McKay: Look at that record. Is that your original record of that morning's business?

Mr. Clifton: Do not testify to it until we look at it.
The Court: He can testify that is the record.
Mr. McKay: Do not answer this until counsel has objected and the Court has ruled. Does your record show that on that morning you took up three passengers on mileage at Lane and carried them to Savannah, Ga.?

Mr. Nelson: We object.
The Court: Objection is sustained.

R. H. Josey (white), sworn, says:

Mr. McKay: On the 19th of December, '10, what was your position with the Atlantic Coast Line Railroad Company?
A. Ticket agent at Lanes, S. C.
Q. State whether or not on that morning, December 19, '10, you sold any mileage tickets for train 83 for Savannah?

Mr. Clifton: We object; irrelevant.
The Court: I sustain the objection.

59 Mr. McKay: State whether or not you sold any during the month of December.

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Mr. Clifton: There is no testimony it is original.
Mr. McKay: He says it is.
Witness: That is my record.
Mr. McKay: In your own handwriting?
A. Yes, sir.
Mr. Clifton: Had you said so prior to just now?
Mr. McKay: He had.
(Identified W. H. M.)
Mr. McKay: Just identified to show we did offer this.
Mr. Willcox: We want that identified as evidence of having offered the record.

The Court: You will save time by putting the record in.

62 Mr. Nelson: This is the original record, or copy; to make the record straight for purposes of appeal.

The Court: Yes; no use to burden the record with a mass of printed documents.
Mr. Clifton: We object to even the identification on the ground having been offered and rejected, no necessity to put them in.
Mr. Willcox: State that was the record that was ruled out.
The Court: You have enough evidence to raise the question, any question you want to make about the U. S. Supreme Court, enough has been offered.

Cross-examination:

Mr. Clifton: Inasmuch as you are the last witness on this: your train ran from Orangeburg to Sumter, Lane, Florence, Sumter to Orangeburg?
A. Yes, sir.
Q. Entirely and altogether in the State of South Carolina?
A. Yes, sir.

Mr. McLemore: We have one other witness by whom we wish to prove this particular train 46 handled U. S. mail interstate.
The Court: Better go ahead and offer him.

J. S. Neggs (white), sworn, says:

Mr. McLemore:

Q. On December 19, '10, what position did you occupy?
A. Railway postal clerk.
Q. On what train?
A. 46.
Q. On the Atlantic Coast Line?
A. Yes, sir.
Q. This Sumter train, running Orangeburg, Sumter, Lane and Florence?
A. Yes, sir.

63–183 Q. State if it is not a fact that on December 19, on that train, you as mail clerk put off at Lanes and Sumter U. S. mail destined to points beyond South Carolina?

Mr. Clifton: We object.
The Court: I rule that out.

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Cross-examination:

Mr. Clifton: The run of this train—that train ran from Orange-
rg to Sumter, Lane, Florence, Lane and Sumter to Orangeburg?
A. Yes, sir.
Q. Absolutely and only?
A. Yes, sir.
Q. Purely a State train, in this State?
A. So far as the train is concerned.

* * * * * * *

Motion for Direction of Verdict.

Mr. McKay: We move for the direction of a verdict.
First Ground. No evidence of wilfulness and nothing here proven
sustain the claim of punitive damages before the jury. We sub-
it there is an entire absence from the record of any evidence that
ill warrant any jury passing on the question of punitive damages.
The Court: I think it would be contempt of the Supreme Court
rule in favor of that motion. The Supreme Court sent it back,
id the judgment was wrong in so deciding and taking it away
om the jury. If I sustained that motion I would be in contempt
the Supreme Court.
Mr. McKay: Counsel does not mean to be in contempt of court.
The Court: I do not know how counsel think about it, but the
urt thinks so.

Mr. McKay:

Second Ground. We wish to move for the direction of a verdict
the ground, there is no evidence of negligence, nothing proven
the foundation for damages flowing from negligence on our part.
Third Ground. That the entire evidence shows that the injury
ceived by the deceased resulted from his contributory and gross
gligence, or wilfulness.
Fourth Ground. That the injury resulted entirely from the negli-
nce and wilfulness of the deceased.
The Court: In passing on that motion I will read so it will go
o the record what the Supreme Court said on this point. The
preme Court decided in this case that "There was testimony tend-
g to prove, every material allegation of the complaint that was
t in issue."
"After the introduction of testimony by the plaintiff, for the pur-
se of establishing the facts just mentioned, the defendants offered
evidence contradictory thereof, for the purpose of showing
5 that they were not guilty of negligence or recklessness, and
to sustain their defense, that the plaintiff's intestate was guilty
contributory negligence.
"If the jury believed the testimony offered by the plaintiff, then
was unquestionably susceptible of the inference that the injury
s the direct and proximate result of negligence or recklessness
the part of the defendants, and not of gross negligence on the part

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of the plaintiff; while, on the other hand, if they believed the testi mony introduced in behalf of the defendants, including that whicl contradicted the evidence offered in behalf of the plaintiff, then i was susceptible of the inference, that the injury resulted directly and proximately from the gross negligence of John J. Mims. It was however, for the jury, not only to determine whether they believed the whole or any part of the testimony introduced by either party but also to draw the inference therefrom.

"The defendants seem to attach much importance to the testimony of L. I. Parrott, then Clerk of the Court, who testified that he heard some one ask John J. Mims, immediately after the injury."

Mr. McLemore: We object to your Honor reading to the jury that opinion about Mr. Parrott, or the effect of that testimony.

The Court: You made the motion before me, and I propose to put my ruling on record and show why I am making that ruling.

"That he heard some one ask John J. Mims, immediately after the injury: 'My God, John, how did this thing happen,' and that Mims replied: 'I thought I could make it,' or 'I thought I could cross,' or some expression of that kind." We do not, however, attach the same importance to it on account of the subsequent testimony of this witness.

"The record shows that the following took place subsequently:

186 "Mr. PARROTT, recalled:

"Mr. Clifton:

"Q. In the statement you made as coming from Mr. Mims, you say that there is no absolute degree of certainty, whether he referred to his physical condition or ability to get across the track; you can say which he referred to? Whether he was in such physical condition that he was unable to get across the track, or had the time to get across? A. What I heard on the grounds, what the person said with reference to his physical condition, impressed my mind with the fact, that it was on account of his physical condition.

"It appears from the testimony that Mims was not then in good health, physically, and the statement of the witness is, that the remarks made by Mims had reference to his physical condition and not to the question whether he had time to get across on account of the proximity of the train.

"His Honor, the presiding judge, based his ruling on the case of Drawdy vs. Ry., 78 S. C., 375, which he held to be conclusive of the present case. Upon comparison of the facts in the two cases, it will be found that they are materially different.

"It is the judgment of this Court that the order of the Circuit Court be set aside and the case remanded to that Court for a new trial."

Under that decision, gentlemen, the motion is refused, and those are the grounds upon which I refuse it.

Mr. McKay: We wish to enter exception.

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Judge's Charge.

Now, Mr. Foreman and Gentlemen of the Jury: This case, gentlemen, of Lizzie M. Mims, administratrix of the estate of John J. Mims, deceased, against the Atlantic Coast Line Railway Company, and S. B. Divine, is now before you to find a verdict upon the
187 facts under the principles of law applicable thereto, which is the business of the Court to give to you, and it comes before you for determination under the decision of the Supreme Court in the same case in which that Court directed that the case be sent back here for a new trial and directed this Court to submit the case to the jury.

Now, gentlemen, as to whether or not this Court, the Judge here, will have any opinion about the facts of the case one way or the other, you are not concerned with any expression that might fall from the lips of the Judge, which might indicate to you that he thought one way or another about the case; you would not let that influence you in any manner, shape or form, because that is not the business of the Judge. Your business is to decide it upon your own responsibility.

In order to decide the case, gentlemen, you will have to have before you what are the issues in the case and what are the questions to be decided, and you gather that and get at it from what are known as the pleadings in the case. On behalf of Mrs. Mims we have a paper here known as the complaint, in which she comes in by her lawyers and alleges charges what she claims against the railroad company and Divine, as the basis upon which she claims she is entitled to claim damages sought, to wit: sixty thousand dollars, and you have the answer of Divine and the answer of the railroad. Now, you will have these papers in your jury room, gentlemen, and they set out in detail exactly what is claimed on behalf of the plaintiff, Mrs. Mims, in the complaint, and exactly the claim on behalf of Divine and the railroad in the answers. This Court is not going to burden you by reading them over again, because they have been read in your hearing. You will have them in the jury room to refer to, and the Court will only state them in a general way, giving the salient points.

Now, the basis of Mrs. Mims' claim, as you understand, is that she comes in here as administratrix of her deceased husband,
188 under the statute which says, which declares, where death has been suffered by reason of the wrongful act, etc., of a person, or a defendant, or any one, corporation or otherwise, that there shall be a right of action brought by her on behalf of herself here as the widow of this dead man, and her children, children of herself and that dead man.

She charges that John J. Mims was brought to his death by reason of the negligence on the part of this railroad company and Divine, engineer, combining and concurring to bring about the death of Mims. Those acts of negligence are specified generally to be that he was upon a public crossing, street or crossing, in the City of Sumter,

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and that the engine of the defendant company was run by Divine the engineer of the company, without sounding the bell or blowing the whistle, and running at a reckless rate of speed, came there and killed him, and goes on and says that it gave him no warning of it approach, and goes on furthermore and says that in their own yard there, that is, in the yard of the railroad company, that they were running at a reckless, unusual rate of speed; that they gave insufficient, if any warning at all, of the approach, by giving any signal or sounds; not sufficiently equipped with a man on the rear end of the tender to give such warning, etc.; and claims not only was that so, but that Divine, as an engineer, was known to the Atlantic Coast Line Railway to be a reckless engineer, and that, notwithstanding their knowledge of that, they kept him in their employment, charging that as a matter of negligence on their part. She claims not only this was negligence on their part, not only charge that the facts they claim, set out in their complaint show that, but that it was wilful, wanton, reckless conduct on their part for which the plaintiff Mrs. Mims, claims that both the railroad company and the engineer are liable.

Now, the railroad company comes in and denies all negligence on its part; and then it sets up as a defense that even if it was
189 negligent, that, nevertheless, the death of Mims was caused by his own negligence, concurring and combining with the negligence of the railroad in bringing about his death, as a proximate cause of his own negligence so combining and concurring. They go a step further and say, under the law in reference to injuries at crossings of railroads, that if the man was killed upon the crossing and killed through negligence, nevertheless he was guilty of more than negligence; that he was guilty of gross and wilful negligence and so, therefore, could not recover under the view of the case they claim.

The first question that arises is: what is negligence? Negligence is defined in law to be the failure to exercise due care, it being for the jury to say in each particular case what due care was; that is the failure to do something that a reasonably prudent person would have done, or the doing something which a reasonably prudent, careful person would not have done. Now, the jury are to say, under the facts and circumstances of the case, whether or not negligence exists.

Now, gentlemen, in reference to contributory negligence, that is defined to be, that means that where a party seeking damages, the deceased person in this case, Mims, who was killed, that if he himself was also guilty of negligence contributing, combining as the proximate cause of his injury, that he would be guilty of contributory negligence in law and would not be able to get a verdict even although you decide the railroad was negligent, unless you go a step further and decide that the railroad was guilty of wilful, wanton or reckless conduct as against which contributory negligence would be no defense.

Now, then, gentlemen, in reference to the law in respect to crossings, the law is contained in our statute that 500 yards before approaching, before reaching a crossing, public crossing, that the bell

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must be rung or whistle sounded for at least 500 yards before
190 coming to the crossing, a failure to do that, if it is proved, and injury result at the crossing and a man is killed, why, then, the law holds that is prima facie evidence of negligence, the failure to ring the bell or sound the whistle, of one or the other.

Now, in reference to the rate of speed—as to the rate of speed an engine shall go, at a crossing in its own yard or elsewhere, where the rate of speed is not fixed by law—it is a question for the jury in each particular case to say whether or not the rate of speed was excessive or not, so excessive as to satisfy them in their judgment there was negligence, failure to exercise due care.

In reference to the duty of a railroad as to a person near, or approaching, or upon their tracks, the law has been very clearly laid down in this State, that the engineer has the right to assume that such person, even if near the track, will not get on the track, and if on the track, will get off of the track. That is, unless there is something about the person which will convey to the engineer the information, which should come to him in the exercise of ordinary care, which he is required to exercise, that that person was not going to use his faculties either about getting on the track or not getting on the track.

As illustrated in a case in our books, where an engine was going through the country, a man was sitting down on the end of a crosstie in a perilous position, with reference to the engine coming down on the track. He was sitting with his head bowed down in his hand and the engineer nevertheless came on, struck him and killed him. The Court held while, of course, that principle which I have stated to you as correct in governing, but ordinarily an engineer has the right to assume a person will get off the track, and yet there was that about the man which should have conveyed to the engineer a knowledge that that man was not in the exercise of his ordinary faculties; that he was sick, or incapacitated for some reason or another, and
191 that the engineer should have stopped and would not have killed him, and that his conduct there was wilful, wanton or reckless, even though the man was a trespasser and had no rights whatever upon the track, other than not to be killed wilfully, wantonly or recklessly. So you see that is the general duty. The engineer knew from—I will read to you what the Court said on that point to make it clear to you:

The true principle it is conceived is that the engineer should see that the track is clear, but that when an obstruction is perceived, the proper course to adopt will depend upon whether it is a living or inanimate object, whether it is an intelligent human being under ordinary circumstances of discerning the means of securing safety, or a brute, which has no guide but mere instinct. If the object seen is an intelligent human being, it seems to be generally agreed that the engineer has the right to presume that he will get out of harm's way before the engine reaches him, and that it is not negligence to act upon that presumption. In the case of Sentell vs. Railroad, the Court uses this language in regard to a trespasser: "It makes no difference if the trend of the testimony was that Sentell was a naked

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trespasser, the defendant owed him a duty, to wit: that he sho
not be treated by the defendant without some regard to the dict
of humanity. There was positive testimony that the engineer co
have seen Mr. Sentell in plenty of time to have stopped the train
fore reaching him, and thus have saved his life. All in all, th
was plenty of testimony to show negligence. Therefore the Spe
Judge should have refused the motion for nonsuit."

Now, leaving this line, gentlemen, I want to call your attent
to this: that in crossing cases, that is, where a killing takes pl
upon a crossing, a man is killed upon a public crossing, as char
in this complaint, that this man was, if the negligence is sho
which is charged in the complaint, if shown there was ne
192 gence in respect to his being killed on the crossing, his re
ery is not defeated by saying that he also was merely ne
gent. It must be shown that he was guilty of more than mere ne
gence, of gross or wilful negligence, or violation of law. In the
of negligence, killing upon a crossing, the defense of contribut
negligence is not a good defense unless it go to the extent of show
that the man killed was himself guilty of gross, or wilful, or want
or reckless negligence, of violation of law, contributed to his own
jury as a proximate cause thereof. Now, upon proof of mere ne
gence, mere failure to exercise due care, unless the killing be upo
public crossing, then his contributory negligence is a good defe
that is, if it is shown that the man was himself guilty of failing
exercise due care, because the law requires that of him. Unless i
shown that the negligence proved and found by the jury against
defendant sued if of such gross negligence and wilful, wanton
reckless conduct, then contributory negligence is no defense.
because a man is negligent is no reason why he should have the ri
to go to work and kill him wilfully, wantonly or recklessly. You
gentlemen, that is the idea to be conveyed there. That contribut
negligence, that is, mere negligence on the party killed, if you
cide he was guilty of failure to exercise due care, is not a defe
against wilful, wanton or reckless conduct on the part of the defe
ant sued who killed him. Now, the question for you on that po
is: did that conduct measure up to wilfulness, wantonness or re
lessness such as to defeat the defense of contributory negligen
That is a question for the jury to decide also, it being the idea
necessarily that the man was killed with the deliberate purpose,
tention to kill him, but whether or not the conduct was of so g
and reckless nature as to show a total utter disregard for the m
life; and if the conduct of the railroad, the engineer, was such as t
why, then, gentlemen, the law implies wilfulness, or want
193 ness; that while it may be true the engineer did not delib
ately kill the man, nevertheless he is held, under the law,
gross, wilful, wanton or reckless negligence or conduct, as aga
which contributory negligence is no defense. For contributory ne
gence to defeat recovery under a crossing case, it must go beyond
extent of the man killed being guilty of failure to exercise due c
in order to defeat his recovery, but was his conduct so grossly ne
gent, so utterly in total disregard of his own safety, or acted

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violation of law. If there is that kind of conduct on his part in a crossing case, he cannot recover, unless, of course, you find that the defendant sued was guilty of that wilful, wanton or reckless conduct—negligence—that I have referred to as against which, I have stated, contributory negligence is no defense.

Now, there is another distinction between mere negligence and wilful, wanton or reckless negligence under the distinction I have given you of it. Upon the proof of mere negligence you can only award actual damages. Upon the proof of the other kind of negligence, wilful, wanton or reckless negligence, you find also punitive damages.

Now, the statute under which this action is brought, brought by Mrs. Mims on behalf of herself and his widow and children, says damages shall include both actual and punitive damages as are proportioned to the injury sustained by the persons by whom and on whose behalf the action is brought. That is the rule the statute gives to you. Actual damages only can you award upon proof of mere negligence. That is, the mere failure to exercise due care. If you go a step further and find the higher degree of negligence charged in the complaint, you can award punitive damages in addition to actual damages. The statute says in proportion to the injury sustained by the parties on whose behalf and for whom the action shall be brought.

194 Now, I have propositions of law here which I am going to read to you, and which clearly state the law on this point, submitted to me on behalf of the plaintiff, Mrs. Mims.

"I charge you that under Section 3230 of the Code of Laws of South Carolina, where a person is injured by collision with the engine or cars of a railroad corporation at a public crossing, if the railroad fails to give the signals required by statute"—I have already stated what those are, ringing the bell or sounding the whistle, under those circumstances I have named—"and such failure is a proximate cause of the injury, the plaintiff can recover damages no matter if he himself was guilty of negligence." That is mere negligence. "To prevent the plaintiff from recovering it must be made to appear to the satisfaction of the jury that he was guilty of more than mere negligence, and that he was guilty of gross or wilful negligence, or was acting in violation of law, and that such gross or wilful negligence, or unlawful act, contributed to the injury as a proximate cause thereof. In other words, mere contributory negligence will not defeat a recovery by a person injured at a crossing due to the failure on the part of the railroad company to give the statutory signals, and the plaintiff in such case cannot be defeated unless he was acting in violation of law."

"I charge you that Section 3230 of the Code of Laws of South Carolina provides if a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by statute, and that such neglect contributed to the injury as a proximate cause thereof, the corporation shall be liable for all damages caused by the collision, unless it is shown that, in

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addition to a mere want of ordinary care, the person injured o
person having charge of his person or property was, at the tim
the collision, guilty of gross or wilful negligence, or was
195 ing in violation of law; and that such gross or wilful n
gence or unlawful act contributed to the injury."

"I charge you that the law requiring railroad companies to
certain signals upon approaching and crossing a public crossi
as much for the benefit of its employees and servants as for passe
or strangers on the highway, and the servant of a railroad com
is entitled to the same rights and remedies as are allowed by la
other persons not employees."

"I charge you that contributory negligence is an affirmativ
fense and must be proved by the greater weight of the evidence,
I further charge you that contributory negligence is no de
against an injury wilfully, wantonly or recklessly inflicted."

"I charge you that it is the duty of a railroad company oper
an engine or train of cars, to use due care, through its enginee
other agent or servant, to prevent injury to persons lawfully
its track, and to give proper signals or warning, and it is likewis
duty of the engineer or other person in charge of such engi
train of cars to use reasonable care in the operation of such en
or cars to avoid injury to persons lawfully upon the tracks."

"I charge you that the failure to give the signals require
statute in approaching a crossing, is negligence as a matter of l
That is, as to one who is injured upon a crossing.

"I charge you that in the absence of statute whether or no
given rate of speed by an engine or train of cars is negligen
wilful or reckless, is entirely within province of the jury—tha
jury can take into consideration the surroundings. That wh
the engine or train is being run in the open or sparsely settled c
try, or within a town or thickly settled place, or whether the en
or train is being run in a place of known or apprehended dange
in an open and supposedly safe place, it is for the jury t
196 in a given case whether the speed was so great as to am
to negligence, and whether or not, if it was excessive
negligent, that it was a proximate cause of the injury compla
of."

"If one by the negligence of another has been placed in a situa
of apparent imminent peril, he is not required, in attemptin
escape therefrom, to use the judgment and discretion that is requ
of him when not dominated by terror of impending danger, an
without having time to deliberate, and acting upon the instin
self-preservation and as a prudent person might be expected t
in the circumstances, he is injured by adopting a dangerous
native, he may still recover from the one by whose negligence h
been impelled to act."

That is under the principle, gentlemen, of what is known
man making an error in extremis, error in extreme case. Th
if you are brought in peril by the negligence of another person
make an error of judgment, and fail to save yourself by reaso
having adopted the wrong instead of the right course, that that

defense as against the action for your damages, because it comes back to the fact that your position of peril and your injury was caused and brought upon you by the negligence of that person.

Now, then, gentlemen, only one other point to be called to your attention, and that is this: If you decide in favor of the plaintiff in the case, find a verdict in favor of the plaintiff for whatever sum of money you decide upon. You can find a verdict against both or against either one of the defendants. Write the verdict, We find for the plaintiff so much money against the Atlantic Coast Line Railway Company, leaving out Divine, or you can say, We find for the plaintiff so much money against Divine, leaving out the railroad company, or find it against both, according as you might decide.

If you decide in favor of the defendant-, why then your verdict would be, We find for the defendants. Bear in mind through-
197 out the whole inquiry that the burden of proof of coming in here and making out the case, the allegations of the complaint, charges of negligence alleged against the railroad and Divine, the burden is upon the plaintiff to prove these things, not by the mere statement in the complaint, but by the greater weight or preponderance of the evidence. Unless she has made out, by the greater weight or preponderance of evidence, the negligence charged, or some one act of negligence charged against the railroad and against Divine, or against one or both or the other, why then the case absolutely fails. Now, then, if you decide that is made out (negligence) by the greater weight or preponderance of the evidence, you would ordinarily go to work and write the verdict for the plaintiff. But you have to take up the defense set up, the defense, first of contributory negligence and then the defense which you heard interposed under the crossing statute, wilful, wanton negligence, or violation of law. Both of those defenses are affirmative defenses in law, and the burden of proof is on those who set them up—the defendants in the case—to prove them by the greater weight or preponderance of the evidence.

I hope you understand that you take up the question of plaintiff's making out the case of negligence, also the charges made here against the parties. If the testimony is evenly balanced, that is not sufficient for the plaintiff, and you would not find for *them*. You would go no further and would find a verdict for the defendants; must be the preponderance of the evidence on behalf of the plaintiff; outweigh, must outweigh. Now, if you find it does outweigh, then you go and take up their defenses. When you take up those, bear in mind if either one or both be established, why there the preponderance of the evidence must be in favor of the railroad company and Divine, who set them up as affirmative defenses as against the right of the plaintiff to recover.

198 This case is entirely before you. You have had the benefit of able arguments and you have heard the evidence and the general principles of law bearing upon it. You decide it strictly upon the facts and not influenced in any way, shape or form by anything except the law to which the facts may be applicable. Write the verdict on the back of this yellow paper marked Summons and

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Complaint. You write either, We find for the plaintiff so much money, writing it out in words, not in figures, either against both or either of the defendants; or you write, We find for the defendants.

Mr. McLemore: No issue in this case whether or not there was a sufficient number of men furnished as the crew on this particular engine; no issue of that kind in the case.

The Court: I do not believe there is anything like that.

Mr. Clifton: We said they did not keep a lookout.

The Court: I said they did not have a man on the back of the tender.

Mr. McLemore: Does your Honor intend that as a correction?

The Court: There is no charge that they didn't have enough men in the crew, gentlemen. The charge in that particular is that they were negligent in not having a man on the rear end of the tender to keep a lookout. It is a question for you, if they didn't have a man, whether it was negligence in not having it. It is a question for you to decide.

Exceptions.

Exception I. His Honor, the presiding judge, refused to allow defendant to introduce testimony as follows:

(*a*) W. B. PRYOR (Train Dispatcher):

"Mr. McKay: State whether or not, from your record, on the morning in question there were trains passing through Sumter, Atlantic Coast Line, from without the State of South Carolina, and trains from within the State of South Carolina, going without the State?

199 "Mr. Clifton: We object.

"The Court: Objection sustained.

"Mr. McKay: State whether or not that was the case between the hours of 8 and 10 in the morning of that day?

"Mr. Clifton: Same objection.

"The Court: Objection sustained."

(*b*) W. F. FLAKE (Flagman, freight train, Sumter to Robbins):

"Mr. McKay: Was A. C. L. 2082 car in that train that morning?

"Mr. Clifton: We object, irrelevant. He was not injured or killed by train going to Robbins.

"The Court: Bringing in some interstate commerce; that is ruled out irrelevant, nothing to do with the case.

"Mr. McKay: Was that car, A. C. L. 2082, a car filled with cotton and destined to Augusta on this trip?

"Mr. Clifton: Do not answer.

"The Court: Irrelevant."

(*c*) CARROLL BROOKS (Conductor Train No. 46):

"Mr. McKay: State whether or not on that date (19th December) you carried certain passengers on mileage from Sumter to Lanes?

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. Clifton: Do not answer; we object.
e Court: Irrelevant; he can not say; that is not defense for
Mr. Mims in any shape or form.
. McKay: Our purpose is to connect this mileage with inter-
hipment.
e Court: I exclude it as irrelevant."

D. L. LYNCH (Conductor Train No. 83, passing Lanes) as
:

"Mr. McKay: State whether or not — Lanes on this day in
uestion, you picked up three passengers, three mileage pas-
sengers, and carried them to Savannah, Ga.?

. Clifton: The mileage itself would be the best evidence; and
ly, irrelevant.
e Court: One objection is enough; it is irrelevant.
. McKay: You object to this as irrelevant? Have you got your
l record with you?
My report that day.

e Court: The original record would not make it relevant.
. McKay: It was objected to on the ground of the record.
e Court: I sustain the objection on the ground of irrelevancy;
ot bear in any way on the defense for killing Mr. Mims, as
in the complaint, or stated in the answer."

R. H. JOSEY (Agent at Lanes), as follows:

State whether or not on that morning, Dec. 19th, 1910, you
y mileage tickets for Train No. 83 for Savannah?
Clifton: We object, irrelevant.
e Court: I sustain the objection."

ness recalled:)

State whether or not at that time the Georgetown & Western
exchanged any mileage over any other railroad?

Clifton: We object on the ground, irrelevant.
e Court: Absolutely irrelevant in this case."

G. C. RUMPH (Baggage Master on Train No. 46), as fol-

Is it a fact that on this morning in question you had a trunk
ge that was to go out of the State of South Carolina?

"Mr. Clifton: We object.
"The Court: Overruled on the same ground. I think you
en have about exhausted the number of witnesses you may
this point, taking up a vast amount of time.
McKay: This is the last witness. State whether or not on
rning in question you had a trunk in charge checked from
to Savannah?

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"Mr. Clifton: Same objection.
"The Court: Same ruling.

"Mr. McKay: Does your record show that fact?

"Mr. Clifton: We object.
"Mr. McKay: We want to offer the record in evidence.
"Mr. Clifton: We object to the record on the ground, irrelevant.
"The Court: This case has been in the Court how many years? How long since the case was started?
"Mr. Clifton: January, 1911.
"The Court: After this case has been passed upon before, an answer put in, and amended answer allowed, seems to have occurred to counsel that this Court has no jurisdiction by reason of interstate commerce business. I can not understand that. I have overruled all this testimony. I am not going to hear any more of it now.
"Mr. McKay: You refuse to allow this original record to go in?
"The Court: Yes.
"Mr. Clifton: There is no testimony; it is original.
"Mr. McKay: He says it is.
"Witness: That is my record.
"Mr. McKay: In your own randwriting?
"A. Yes, sir.
"Mr. Clifton: Had you said so prior to just now?
"Mr. McKay: He had.
202 (Identified W. H. M.)
"Mr. McKay: Just identified to show we did offer this.
"Mr. Willcox: We want that identified as evidence of having offered the record.
"The Court: You will save time by putting the record in.
"Mr. Nelson: This is the original record, or copy; to make the record straight for purposes of appeal.
"The Court: Yes, no use to burden the record with a mass of printed documents.
"Mr. Clifton: We object to even the identification on the ground having been offered and rejected, no necessity to put them in.
"Mr. Willcox: State that was the record that was ruled out.
"The Court: You have enough evidence to raise the question, any question you want to make about the U. S. Supreme Court, enough has been offered."

(*g*) J. S. NEGGS (Railway Postal Clerk on Train No. 46), as follows:

"Q. State if it is not a fact that on Dec. 19, on that train, you, as mail clerk, put off at Lanes and Sumter mail destined to points beyond South Carolina?

"Mr. Clifton: We object.
"The Court: I rule that out."

The ruling out of this evidence constituted error in that it was relevant and competent to prove that plaintiff's intestate was engaged in inspecting trains engaged in interstate commerce and hence that

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is action falls within the terms of the Act of Congress known as mployers' Liability Act.

Exception II. His Honor, the presiding judge, ruled that defendnt could not prove that the cause herein came within the terms of the Employers' Liability Act, because said Act was not 03–206 pleaded and that the decisions of the Supreme Court of the United States on this point were not binding on the ourts of this State; said ruling constituted error in that it is not ecessary to plead the Act in question in order to raise the issue, and, rther, in that the decisions of the Supreme Court of the United tates in this regard are governing and controlling on the courts of outh Carolina.

* * * * * * *

07 *Agreement.*

We hereby agree that the foregoing shall constitute the "Case and Exceptions" for appeal herein; that the same, when printed, shall onstitute the Return, and that no other and further Return shall e required; that no Return shall be required to be filed in the ircuit Court.

(Sgd.) JOHN H. CLIFTON,
NELSON, NELSON &
GETTYS,
Attorneys for Plaintiff-Respondent.
P. A. WILLCOX,
L. W. McLEMORE,
BARRON, McKAY,
FRIERSON & MOFFATT,
Attorneys for Defendant-Appellant.

A true copy.

U. R. BROOKS, *Clerk.*

[Seal Supreme Court of South Carolina.]

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208 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Fifth Circuit, Richland County, November Term, 1914.

No. 28.

LIZZIE M. MIMS, as Administratrix of the Estate of John J. Mims, Deceased, Plaintiff-Respondent.
against
ATLANTIC COAST LINE RAILROAD COMPANY and S. B. DIVINE, Defendants-Appellants.

Opinion by R. C. Watts, A. J.

This was an action by Plaintiff as administratrix for the benefit of herself and her four minor children to recover damages for the death of her husband on December 19, 1910, caused by the a[illegible]ed joint and concurrent carelessness, negligence, recklessness, wilfulness and wanton-ess of the Defendants. This is the second appeal in the case. In the first case at the close of all the testimony his Honor, Judge Spain, granted a non-suit, which upon appeal was reversed. The decision on the first appeal is reported in 95 S. C., 370. The suit was brought under what is commonly known as the Lord Campbell's Act. The Allegations of the complaint and answer do not show that Plaintiff's intestate was engaged in interstate commerce at the time he was killed, and during the time of the first trial and in the appeal therefrom no mention is made by the Defendants of the Act of Congress known as the Federal Employers' Liability Act. Not only was no mention made of the Federal Act during the first trial and appeal although it was as available to the Defendants on the first trial as the second but it appears at the second trial the Defendants obtained leave over objection of the Plaintiff and were permitted to amend their answer by setting up the defence of wilful and gross contributory negligence on the part of the Plaintiff's intestate under the South Carolina statute. The second trial was had before Judge Memminger and a jury and resulted in a ver-
209 dict in favor of Plaintiff for $16,000. As soon as Plaintiff's case was closed the Counsel for Defendants announced that train 46, which Plaintiff's intestate was inspecting while killed was engaged in interstate commerce, and that they would introduce testimony to show that in the inspection of this train and otherwise the Plaintiff was engaged in commerce between the States, and consequently the Statute under which Plaintiff was bringing her case had been suspended by the Act of Congress of the United States known as the Federal Employers' Liability Act, April 22nd, 1908. The — refused to allow the Defendants at that time under the pleadings to raise this issue and refused to admit any testimony in regard thereto. The Court also refused to direct a verdict in favor of Defendants as asked for. After entry of judgment Defendants' appeal.

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eptions 1 and 2 allege error on the part of the Presiding Judge
using to allow certain testimony, which the appellants contend
show that when Plaintiff's intestate was killed he was engaged
erstate commerce, and in refusing to allow testimony which
dants' Counsel stated they would offer for the purpose of
ng the case under the Employers' Liability Act, and the re-
of the Judge at that time. His Honor took the position that
stimony was irrelevant and not responsive to the pleadings
ot an issue in the case. That the case had been passed upon
Supreme Court and an amendment over objection of Plaintiff
d just before proceeding with the second trial. After the
iff's testimony was all in for the first time it seems to have
ed to the Defendants that they wanted to avail themselves of
deral Statute Employers' Liability Act. The facts in every case
be pleaded. Whenever the pleadings show facts pleaded that
e is one that can be tried either under the Federal or State law
he Court can try it under either law. When the pleadings
acts that bring it under the Federal law it must be tried under
ederal law, and when the pleadings show it is brought under
te Law is must be tried under that law.

Complaint was filed April 5, 1911, and alleges deceased was
killed December 19, 1910, and alleges Defendants controlled
and operated its Railroad in the Counties of Sumter and
Richland, and Cities of Sumter and Columbia, S. C., and it
re alleges that the Defendants operated its road in any other
than South Carolina, and there is no allegation in the Com-
whereby it could be inferred that Defendant Railroad was
ed in interstate commerce, but the Complaint clearly alleges
the time of the death of the deceased it was engaged in intra-
usiness. The Defendants answered without alleging that at
ne the deceased was killed while in their employment that he
gaged in the inspection of a car which was engaged in inter-
ommerce. These facts must have been known, or should have
nown, to them if they existed. They try the case in 1912 be-
udge Spain, Defendants obtain a non-suit, which upon appeal
rsed, and the case is ripe for a trial before Judge Memminger
motion to amend answer is made and allowed and still no
made to set up this defence and advertise the Plaintiff of this
e. It does seem to us that justice and fair dealing under all
circumstances of the case should have *been* required the De-
ts if they intended to invoke the benefits, which they thought
issue to them under the Act of Congress to plead the facts
ble to bring it under the Act. It would be an injustice at this
f the cast to allow this defence. The Plaintiff alleged he was
d in intra-state commerce when he was killed. The first trial
l that he was. When his Honor in the exercise of his discre-
lowing the Defendants to amend their answer permitting them
y asked for there was no hint or suggestion that he was en-
in inter-state commerce. If he was, the information was, or
have been known to them, and if they desired to raise this
hey should have set forth such allegations in their answer as

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to raise an issuable fact, but this they failed to do, but knowing that the Plaintiff by her pleadings based her case on the State Law, and after a trial under that Law and an appeal without any reference or suggestion even or allegation being made to the Federal Employers' Liability Act or that the deceased at the time of his injury was engaged in inter-state commerce waits until close of Plaintiff's testimony in the second trial and without even seeking to amend
211 their answer attempt- to bring into the case by introducing evidence and seek a direction of a verdict upon a ground not pleaded. The Plaintiff alleges that she has a cause of action against the Defendants and is entitled to a trial either under the State or Federal Law, the pleadings made out a case to be tried under the State Law, and under the pleadings his Honor was correct in ruling as he did. It is not necessary to plead either a State or Federal Statute, but it is necessary to plead facts which bring it under one or the other, and when the pleadings show that it was interstate commerce the State or Federal Courts try it and Federal Law governs, when the pleadings show it was intra-state commerce the State Law governs. The Defendants should have pleaded the Federal Act or at least such facts as would render the Act applicable, and inasmuch as they did not do so and the pleadings made out a case based on the State Law the exclusion of the evidence by his Honor complained of was proper as it was not responsive to any issue raised by the pleadings. If there had been an allegation in the answer that brought it within the Federal Employers' Liability Act it would have been controlled by the Act, although the provisions may not have been referred to in express terms in the pleadings, and proof would be allowed in the case, but in this case there is no such allegation and his Honor committed no error, and these Exceptions are overruled.

Exception 3 is overruled as we see no error on the part of his Honor, it was not in his Honor's opinion a part of res gestæ and other witnesses practically testified to the same thing sought to be proved by Dr. China as to what part of the res gestæ must in a large measure be left to the sound Judicial discretion of the Trial Judge.

Exceptions 4 and 5 are overruled. The facts in this case were practically the same as in the former trial and on former appeal it was held to be error to grant a non-suit on case made out. This certainly became the law of this case, and a res adjudica- as to the points and question presented in the appeal and his Honor was not in error in refusing the same and he had sound reason for refusing the same upon the law decided and the evidence developed.

Exception 6 is overruled. His Honor overruled the motion
212 for direction of verdict and assigned his reason therefor, it was not a part of his charge and could not be prejudicial to the Defendants. It was not such a Judicial indiscretion as was committed by the Trial Judge in Latimer vs. Electric Co., 81 S. C., 374-375, or in Irby vs. Express Co., 96 S. C. 354, or Stokes vs. Murray, 99 S. C., 217, but is analogous to the case of Rearden vs. Insurance Co., 79 S. C. 525. All exceptions are overruled. Judgment affirmed

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We Concur, in the result.
EUGENE B. GARY, *C. J.*
D. E. HYDRICK, *A. J.*
T. B. FRASER, *A. J.*

I concur in the opinion.
GEO. W. GAGE, *A. J.*

A true copy.
U. R. BROOKS, *Clerk.*

[Seal Supreme Court of South Carolina.]

213 [Endorsed:] 9051. The State of South Carolina. In the Supreme Court, November Term, 1914. Lizzie M. Mims, &c., Resp'd't, v. A. C. L. R. R. Co., Appe'lt. Affirmed Opinion by R. C. Watts, A. J. We concur in the result. Eugene B. Gary, C. J., D. E. Hydrick, A. J. I concur in the opinion. Geo. W. Gage, A. J. Filed Supreme Court of S. C. 3 April, 1915. U. R. Brooks, Clerk.

214 *Judgment.*

Judgment affirmed.
By the Court,

Attest:

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk,*

215 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Fifth Circuit, Richland County, November Term, 1914.

LIZZIE M. MIMS, as Administratrix of the Estate of John J. Sims, Deceased, Plaintiff-Respondent,
against
ATLANTIC COAST LINE RAILROAD COMPANY, Appellant, and S. B. DIVINE, Defendants.

Petition for Rehearing.

To the Honorable Chief Justice and Associate Justices of the Supreme Court:

The petition of the Atlantic Coast Line Railroad Company, the appellant in the above stated case, respectfully shows:

That on the 3d day of April, 1915, the court filed its decision affirming the judgment of the lower court, and therein, it is de-

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ferentially submitted, overlooked or disregarded material matters
law and fact, and your petitioner prays that the remittitur herein
stayed and a rehearing ordered upon the following grounds:

First. That the court evidently has not been apprised of the d
cision of the Supreme Court of the United States in the case
Toledo, Saint Louis & Western Railroad Company v. Slavin, a
nounced on the 23d day of February, 1915, and reported U.
Adv. Ops. 1914, page 306 (published April 1, 1915), inasmuch,
is submitted, as the holding in the said case is conclusive of the qu
tion presented to this court on the appeal herein that it w
216 the right of appellants and the duty of the trial court to ha
received and considered evidence that plaintiff's intestate
the time of his injury was engaged in interstate commerce and
have applied in the adjudication of the issues the act of Congress
1908 known as the Employers' Liability Act, to the exclusion of t
statute of South Carolina commonly known as Lord Campbell's A

Second. That in holding and deciding it was legally necessary f
the defendants to have pleaded facts showing that the action w
controlled by the act of Congress above referred to and that by i
terposing by amendment the defense of gross contributory negligen
and wilfulness, under the South Carolina statute, the defendan
waived the right to introduce evidence bringing the action under t
act of Congress or were estopped to introduce such evidence, th
court has overlooked, it is respectfully submitted, the decision of t
United States Supreme Court in the case of Saint Louis, etc., Ra
road Company v. Esterly, 228 U. S. 702, 57 L. Ed. 1031.

Third. That in its decision the court has apparently failed to r
view and consider the contention urged by appellants, that the ev
dence of the interstate character of the transaction under inqui
was admissible under the general denial because such constitutes n
an affirmative defense but merely affirmative evidence of facts goi
solely in denial of plaintiff's cause of action sought to be set up und
Lord Campbell's Act, of South Carolina.

Fourth. That the court, it is respectfully submitted, erred in hol
ing and deciding,

"When the pleadings show facts that bring it under the feder
law it must be tried under the federal law, and when the pleadin
show it is brought under the state law it must be tried under th
law"

217 in that it is the duty of the trial court to apply either th
state law or the federal law according as the facts may sho
the injured party to have been engaged in intrastate or interst
commerce, regardless of the presence or absence in the pleadings
allegations as to the character of the work in which the parties we
engaged at the time of the injury.

Fifth. That in disposing of the third exception (case, folio 81
12) the court has overlooked in its decision the contention of appe
lants urged both on the trial and on the appeal that regardless of th
admissibility of the testimony of the witness, Dr. Archie China,
a part of the res gestæ, this testimony as to a declaration or admissio
against interest on the part of plaintiff's intestate was competent

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an action brought by the administratrix, for the same reasons that would have established its competency had death not intervened and had the action been brought by deceased for the injury.

Your petitioner further prays that it be allowed twenty days from the date of the order staying the remittitur to file its amended petition in amplification of the grounds set forth above.

Respectfully submitted.

ATLANTIC COAST LINE RAILROAD COMPANY,
P. A. WILLCOX,
By BARRON, McKAY, FRIERSON & MOFFATT,
LUCIAN W. McLEMORE, *Its Attorneys.*

218 *Certificate.*

I hereby certify that I am not an attorney in the above entitled action nor am I interested in the event of the same. I have read and considered the foregoing petition and believe that the grounds set forth therein are meritorious.

I. C. STRAUSS.

Atlantic Coast Line Railroad Company, by and through P. A. Willcox, its duly constituted agent and attorney in fact, hereby consents that during the stay of the remittitur in this action the status of the property involved in the case shall not be disturbed until after the final determination of the case.

ATLANTIC COAST LINE R. R. CO.,
By P. A. WILLCOX,
Agent and Attorney-in-Fact.

219 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Fifth Circuit, Richland County, November Term, 1914.

LIZZIE M. MIMS, as Administratrix of the Estate of John J. Sims, Deceased, Plaintiff-Respondent,
against
ATLANTIC COAST LINE RAILROAD COMPANY and S. B. DIVINE, Defendants-Appellants.

Order.

Upon consideration of the annexed petition, it is ordered that the remittitur herein be stayed until the further order of this court and that the defendants-appellants be allowed until the 6th day of May,

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1915, to file their amended petition with this court upon the gr
stated in the annexed petition.

T. B. FRASER,
Associate Justice of the Supreme Court of South Caroli

April 14, 1915.

A true copy.
U. R. BROOKS, *Clerk.*

[Seal Supreme Court of South Carolina.]

Filed Supreme Court of S. C. 14 April, 1915. U. R. Brooks,

220 Supreme Court of S. C. Filed 6 May, 1915. U. R. B
Clerk.

THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Fifth Circuit, Richland County, Nov
Term, 1914.

LIZZIE M. MIMS, as Administratrix of the Estate of John J.
Deceased, Plaintiff-Respondent,
against
ATLANTIC COAST LINE RAILROAD COMPANY, Appellant, and
DIVINE, Defendants.

Amended Petition for Rehearing.

In support of its petition for rehearing, in accordance wit
order of Mr. Justice Thomas B. Fraser, the Atlantic Coast Line
road Company deferentially submits the following amended
tion:

I.

First. That the Court evidently has not been apprised of th
cision of the Supreme Court of the United States in the c
Toledo, Saint Louis & Western Railroad Company vs. Slavi
nounced on the 23d day of February, 1915, and reported U. S.
Ops., 1914, page 306 (published April 1, 1915), inasmuch,
submitted, as the holding in the said case is conclusive of the
tion presented to this Court on the appeal herein that it was the
of appellants and the duty of the trial Court to have re
221 and considered evidence that plaintiff's intestate at the
of his injury was engaged in interstate commerce and to
applied in the adjudication of the issues the Act of Congress of
known as the Employers' Liability Act, to the exclusion o
statute of South Carolina, commonly known as Lord Campbell'

Appended to this amended petition is a full copy of this de
of the Supreme Court of the United States, which we respec

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submit is controlling in its determination of the question of the proper manner of raising the issue that the cause herein falls within the provisions of the Federal Employers' Liability Act. That decision was published in the "U. S. Adv. Ops., 1914, page 306"—issued 1st April, 1915—on which date the opinion in this case was probably mailed to the Clerk of the Supreme Court of South Carolina, it being duly filed by him on 3d April, 1915. The advance sheet reached the offices of the attorneys on the 3d of April, just after said opinion had been filed, and thus neither the attorneys engaged in this case nor the members of the Supreme Court had an opportunity to consider the opinion in the Slavin Case, supra.

For an injury to Slavin an action was brought in the Court of Common Pleas, Lucas County, Ohio, under a statute of that State, and in the pleadings there was no reference of any kind to the Federal Employers' Liability Act. Over plaintiff's objection defendant introduced testimony that the injury was received while plaintiff was engaged in interstate commerce, and on that ground defendant asked a directed verdict, which the Court refused. The Court also refused to charge law applicable to a case under the Federal Employers' Liability Act and held that the cause was controlled by the statute of Ohio. A verdict was rendered for Slavin, a new trial was refused, and the case was appealed to the Circuit Court for Lucas County.

The Circuit Court held that the Federal law should have
222 been applied and thereunder the motion for direction of verdict granted. This judgment was reversed by the Supreme Court of Ohio without opinion and the judgment of the Court of Common Pleas affirmed. The defendant then brought the case on writ of error to the Supreme Court of the United States.

Slavin's contention was identical with this court's holding in the case at bar, as is shown by the following excerpt from that opinion:

"The case having been brought here by writ of error, counsel for the plaintiff, Slavin, insists that the judgment of reversal, without opinion, should not be construed as meaning that the State Court decided the Federal question adversely to the companys' claims, but rather as holding that the defendant's failure to plead the Employers' Liability Act made it improper to consider evidence that the plaintiff had been engaged in interstate commerce, and, hencee, that there was nothing properly in this record to support the contention that the defendant had been deprived of a Federal right."

The Supreme Court of the United States deeming the evidence of interstate employment properly in the record, else it would not have considered it, replied to this contention as follows:

"But a controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the State statute, the defendant was entitled to disprove liability under the Ohio Act by showing that the injury had been inflicted while Slavin was employed in interstate commerce."

This, we respectfully submit, is conclusive of the question of defendant's right to introduce evidence of the interstate nature of Mims' employment.

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In the Slavin case the testimony of the interstate character
employment having been admitted over the objection
223 plaintiff, and such testimony being decided competent
the holding of the Supreme Court of the United States,
above pointed out, and the case having proceeded to a conclusi
without the plaintiff amending his complaint so as to conform
such rights as he had under the Federal statute, that Court said:

"And, if without amendment, the case proceeded with the pro
showing that the right of the plaintiff and liability of defenda
had to be measured by the Federal statute, it was error not to app
and enforce the provisions of that law."

The case at bar unfortunately for the expedition of a final determ
nation does not show the evidence upon which the contention of t
interstate character of Mims' employment is based, since the tri
Court held it inadmissible, and in that respect only it is differe
from the Slavin case. That decision, however, unquestionably la
down:

(*a.*) That a controlling Federal question is necessarily involv
where an attempt is made to show that the Federal Employe
Liability Act is applicable, and

(*b.*) Regardless of pleadings, the defendant is entitled to dispro
liability under a local statute by showing that plaintiff was engag
in interstate commerce; and, further,

(*c.*) Regardless of pleadings, when such proof is admitted a
the case proceeds without amendment the rights of the parties mu
nevertheless be determined by the provisions of the Federal Act.

As the Supreme Court of the United States said in the Slav
case—and this is the radical point of the decision:

"The principle of that decision (in the Seale case) and others li
it is not based upon any technical rule of pleading, but is matter
substance."

II.

Second. That in holding and deciding it was legally necessa
for the defendants to have pleaded facts showing that t
224 action was controlled by the Act of Congress above referr
to and that by interposing by amendment the defense of gro
contributory negligence and wilfulness, under the South Caroli
statute, the defendants waived the right to introduce evidence brin
ing the action under the Act of Congress or were estopped to intr
duce such evidence, this Court has overlooked, it is respectfully su
mitted, the decision of the United States Supreme Court in the ca
of Saint Louis, etc., Railroad Company vs. Hesterly, 228 U. S., 70
57 L. Ed., 1031.

The fact that defendant pleaded defenses under the State Act ca
have no effect on its right to have the cause tried under the law, an
the only law applicable to the case made out. Neither plaintiff n
defendant, by the pleadings, can control or designate under wh
law the case shall be tried; and the pleading of gross contributo
negligence or anything else does not determine the question. Th
point, however, is specifically decided by the Supreme Court of t

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United States in St. L., etc., Ry. Co. vs. Hesterly, 228 U. S. 702, 57 L. Ed., 1031, where it was contended that defendant was estopped to urge that the Federal law was applicable because the defense of contributory negligence under the State law was pleaded. The Supreme Court, through Mr. Justice Holmes, said:

"* * * the plaintiff, not the defendant, had the election how the suit should be brought, and as he relied upon the State law, the defendant had no choice, if it was to defend upon the facts."

We respectfully submit that this Court must have overlooked this opinion when it concluded that the Federal Act could not be urged by the defendant as a matter of right, when it had amended its answer just before trial to set up a defense under a State statute.

225 III.

Third. That in its decision the Court has apparently failed to review and consider the contention urged by appellants, that the evidence of the interstate character of the transaction under inquiry was admissible under the general denial because such constitutes not an affirmative defense, but merely affirmative evidence of facts going solely in denial of plaintiff's cause of action sought to be set up under Lord Campbell's Act of South Carolina.

As recognized by this Court, the Federal Act, where applicable, is exclusive, and consequently when it does apply the litigants are powerless to prevent it. It is not a statute of defense; it is a statute creating and controlling a right of action, and under a general denial the defendant was entitled to show that the cause of action alleged by plaintiff had not been proven, and that the law invoked was not applicable.

The Supreme Court of the United States in the Slavin case has said:

"For, when the plaintiff brought suit on the State statute, the defendant was entitled to disprove liability under the Ohio Act, by showing that the injury had been inflicted while Slavin was employed in interstate business."

The plaintiff had shown in this case that her intestate was going to inspect train 46 at the time he received his fatal injuries. We respectfully submit the defendant, under its general denial, was entitled to prove that train 46 was an instrument of interstate commerce, and consequently that the plaintiff's case was improperly brought under Lord Campbell's Act. In other words, as said by the Supreme Court of the United States in St. L., S. F. & T. R. Co. vs. Seale, 229 U. S., 154-161, 57 L. Ed., 1129-1135, "the case pleaded was not proved."

226 IV.

Fourth. That the Court, it is respectfully submitted, erred in holding and deciding, "When the pleadings show facts that bring it under the Federal law it must be tried under the Federal law, and when the pleadings show it is brought under the State law it must be tried under that law," in that it is the duty of the trial Court to

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apply either the State law or the Federal law, according as the facts may show the injured party to have been engaged in intrastate or interstate commerce, regardless of the presence or absence in the pleadings of allegations as to the character of the work in which the parties were engaged at the time of the injury.

The excerpt from the opinion of this Court is the gist of its decision, and we respectfully submit that this position is incompatible with the decisions of the Supreme Court of the United States, among which are St. Louis, I. M. & S. Ry. Co. vs. Hesterly, 228 U. S., 700, 57 L. Ed., 1031; St. Louis, S. F. & T. R. Co. vs Seale, 229 U. S., 154, 57 L. Ed., 1129. In each of these cases the pleadings were based upon State statutes and recovery was sought thereunder, and there was nothing in the complaint or answer to suggest the application of the Federal Act, and the right to have that law applied was recognized. If these decisions, however, which the Court had before it, were not sufficient to justify our position we respectfully submit that the Slavin case is stronger and is conclusive.

In that decision, as stated before, there was nothing in the pleadings from which any interstate commerce feature could be inferred, and the Supreme Court of the United States decided against the contention of the defendant in error that the carrier was entitled to disprove liability in the action brought under the State statute by showing, over objection, that the complainant was engaged in interstate business at the time of injury. And, further than that, even
227 if the pleadings, based upon a local statute, were not amended, yet, nevertheless, the right of the plaintiff to recover and the liability of the defendant were to be measured by the Federal Employers' Liability Act.

V.

Fifth. That in disposing of the third exception (Case, folio 810-12) the Court has overlooked in its decision the contention of appellants urged both on the trial and on the appeal that regardless of the admissibility of the testimony of the witness, Dr. Archie China, as a part of the res gestæ this testimony as to a declaration or admission against interest on the part of plaintiff's intestate was competent in an action brought by the administratrix, for the same reasons that would have established its competency had death not intervened and had the action been brought by deceased for the injury.

We respectfully submit that Exception III (Case, page 203, folios 809-810) is as follows:

"His Honor, the trial Judge, refused to allow Dr. Archie China to testify regarding statements made to him by Mims as to the manner in which he was injured. This constituted error in that said statements were competent as declarations against interest by the intestate principal, in whose place administratrix now stands, the question, objection and ruling of the Court being as follows:

"Q. What did he state to you?

"Mr. Nelson: We object. The last time it was ruled not part of the res gestæ. If they want it in as a dying declaration it is not com-

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tent; after he was injured, and being to the hospital, the doctor et him. Was this at the hospital? A. As near as I can say, about) yards from where he was hurt.

"Q. How long after the accident? A. Not but a short time.

"Mr. McLemore: We take the position that not only is the testimony of Dr. China admissible, but it is a declaration of the 28 deceased, and is competent as being part of the res gestæ, because so closely connected in point of time. We take the rther position, any statement made by the deceased is competent om this witness; in an action brought by the administrator for his ath, we take the position anything that will be competent in an tion brought for his injury would be equally competent in an tion brought by the administrator for his death.

"The Court: I do not think it would be admissible on that ground."

Thus it will be seen that the third exception was in nowise based this Court upon the contention that the evidence was admissible part of the res gestæ. The opinion of the Court, however, as to is exception was as follows:

"Exception III is overruled, as we see no error on the part of his onor, it was not in his Honor's opinion a part of res gestæ, and other itnesses practically testified to the same thing sought to be proved Dr. China. As to what is part of the res gestæ must, in a large easure, be left to the sound judicial discretion of the trial Judge."

We earnestly point out that this Court must have overlooked the ound of our exception, which was in no way connected with, incint to or dependent upon a consideration of the res gestæ. There is no other evidence in the case that could compare with the weight statements as to how the accident occurred made by the deceased his family physician away from the scene of the accident.

Respectfully submitted,

P. A. WILLCOX,
L. W. McLEMORE,
BARRON, McKAY, FRIERSON & MOFFATT,
Attorneys for Atlantic Coast Line Railroad Co.

29 TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY,
Plaintiff in Error,
versus
OTTO E. SLAVIN.

rror to State Court—Decision of Federal Question—Employers' Liability.

1. A controlling Federal question is necessarily involved in a dgment of a State Court refusing to measure the liability of the fendant interstate railway carrier in an action by an employee to cover damages for personal injuries, by the Employers' Liability ct of April 22, 1908 (35 Stat. at L., 65, chap. 149, Comp. Stat., 13, 8657), where, although the pleadings contained no reference that Act, evidence was admitted over the plaintiff's objection which

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showed that the train on which he was riding at the time of the i
jury was engaged in interstate commerce, whereupon the defenda
carrier insisted that the case was governed by that statute, and th
its application and enforcement would defeat any recovery.

Commerce—Employers' Liability—Conflicting Legislation.

2. The Employers' Liability Act of April 22, 1908 (35 Stat.
L., 65, chap. 149, Comp. Stat., 1913, 8657), governs an action by s
injured employee against an interstate railway carrier to the exc
sion of any applicable State statutes, although the pleadings co
tained no reference to the Federal Act, where the evidence on t
trial shows that the train on which the plaintiff was riding at t
time of the injury was engaged in interstate commerce. (No. 147

Submitted January 20, 1915. Decided February 23, 1915.

230 In error to the Supreme Court of the State of Ohio to r
view a judgment which reversed a judgment of the Circu
Court of Lucas County, in that State, reversing a judgment of t
Court of Common Pleas for such county in favor of plaintiff in
personal injury action by a railway employee against the railwa
company. Reversed and remanded for further proceedings.

See same case below, 88 Ohio St., 536, 106 N. E., 1077.

The facts are stated in the opinion.

Messrs. Clarence Brown and Charles A. Schmettau for plaintiff i
error.

Messrs. Walter G. Kirkbride and C. H. Masters for defenda
in error.

Mr. Justice Lamar delivered the opinion of the Court:

In the Court of Common Pleas of Lucas County, Ohio, Otto Slavi
brought suit against the railroad company for injuries received b
him on the night of August 19, 1910, while he was at work on a trai
in the company's yard at Toledo. His declaration alleged that i
the performance of his duty and in pursuance of a custom know
to the defendant, he was riding on the side of a gondola car with h
foot in the "stirrup" and his hands holding the grab irons. H
averred that while in that position, and without fault on his par
he was struck by another car standing on the adjoining track whic
he did not and could not see in time to avoid the injury. He a
leged that the company was guilty of negligence in laying and mai
taining the yard tracks in close and dangerous proximity to eac
other; and that it was further negligent in failing to give him noti
that the freight car was standing on the adjoining track. The d
fendant denied the charge of negligence. It contended that Slavin
duty did not require him to ride on the side of the car, but tha

with a safe place in which to work, he voluntarily and u
231 necessarily rode in a dangerous position, on the outside of
car passing through a railroad yard, where he knew, or ough
to have known, that trains and cars would be standing.

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There was evidence that the plaintiff had been employed by the company for about ten years—for much of that time being in charge of the switching engine which operated over every part of the yard—and that he was thoroughly familiar with the condition, situation, and location of the tracks at the point where the injury occurred. Neither the plaintiff's complaint nor the defendant's answer contained any reference to the Employers' Liability Act. But, over plaintiff's objection, evidence was admitted which showed that the train on which the plaintiff was riding at the time of the injury was engaged in interstate commerce. Thereupon the railroad company insisted that the case was governed by the provisions of the Employers' Liability Act, and moved the Court to direct a verdict in its favor. That motion having been overruled, the defendant asked the Court to give in charge to the jury several applicable extracts from that Federal statute.

All these requests were refused, the trial judge being of the opinion that the proximity of the tracks constituted a defect in "rail, track or machinery" within the meaning of the Ohio statute; and, that although the plaintiff had notice of such defect, he was not debarred of the right to recover, in view of 9017 and 9018 of the Ohio Code, changing the common law rule as to contributory negligence and assumption of risks. There was a verdict for the plaintiff. The defendant's motion for a new trial was overruled. On writ of error the Circuit Court of Lucas County held that inasmuch as the plaintiff was injured while engaged in interstate commerce, the case was governed by the Federal statute, which did not repeal the common law rule of assumption of risks under circumstances like those set out in the record, and that the defendant's motion for a directed
232 verdict should have been granted. The judgment was reversed and that of the Court of Common Pleas affirmed, without opinion, by the Supreme Court of Ohio.

The case having been brought here by writ of error, counsel for the plaintiff, Slavin, insists that the judgment of reversal, without opinion, should not be construed as meaning that the State Court decided the Federal question adversely to the company's claims; but rather as holding that the defendant's failure to plead the Employers' Liability Act made it improper to consider evidence that the plaintiff had been engaged in interstate commerce, and, hence, that there was nothing properly in this record to support the contention that the defendant had been deprived of a Federal right.

But a controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the State statute, the defendant was entitled to disprove liability under the Ohio Act by showing that the injury had been inflicted while Slavin was employed in interstate business. And, if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law.

In this respect the case is much like St. Louis, S. F. & T. R. Co. vs. Seale, 229 U. S., 156, 161, 57 L. Ed., 1129, 1134, 33 Sup. Ct. Rep., 651 Ann. Cas., 1914, C., 156, where the suit was brought under

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the Texas statute, but the testimony showed that the plaintiff was injured while engaged in interstate commerce. The Court said: "When the evidence was adduced it developed that the real case was not controlled by the State statute, but by the Federal statute. In short, the case pleaded was not proved, and the case proved was not pleaded. In that situation the defendant interposed the objection,
grounded on the Federal statute, that the plaintiffs were not
233 entitled to recover on the case proved. We think the objection was interposed in due time and that the State Court erred in overruling it." The principle of that decision and others like it is not based upon any technical rule of pleading, but is matter of substance, where, as in the present case, the terms of the two statutes differ in essential particulars. Here the Ohio statute abolished the rule of the common law as to the assumption of risks in injuries occasioned by defects in tracks, while the Federal statute left that common law rule in force, except in those instances where the injury was due to the defendant's violation of Federal statutes, which—like the hours-of-labor law and the safety appliance act—were passed for the protection of interstate employees. Seaboard Air Line R. Co. vs. Horton, 233 U. S., 492, 503, 58 L. Ed., 1062, 1069, 34 Sup. Ct. Rep., 635.

In all other respects this case is exactly within the ruling in the case last cited, where the employee's knowledge of the existence of the defect and the terms of the State statute relied on were substantially the same as those in the present case. There the judgment of the State Court—applying the State statute—was reversed because it appeared, as it does here, that the plaintiff had been injured while engaged in interstate commerce, and, consequently, the case should have been tried and determined according to the Federal Employers' Liability Act.

The judgment of the Supreme Court of Ohio is reversed and the case remanded for further proceedings not inconsistent with this opinion.

A true copy.
U. R. BROOKS, *Clerk.*

[Seal Supreme Court of South Carolina.]

234 *Order Dismissing Petition.*

The Supreme Court of South Carolina.

Petition dismissed and order of remittitur stayed until appellants can apply for writ of error for purpose of appealing to U. S. Supreme Court.

EUGENE B. GARY, *C. J.*
D. E. HYDRICK, *A. J.*
R. C. WATTS, *A. J.*
T. B. FRASER, *A. J.*
GEO. W. GAGE, *A. J.*

Supreme Court of S. C. Filed 13 May, 1915. U. R. Brooks, Clerk.

A true copy.
U. R. BROOKS, *Clerk.*

[Seal Supreme Court of South Carolina.]

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35 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

LIZZIE M. MIMS, Administratrix of the Estate of John J. Mims, Deceased, Plaintiff-Respondent,

v.

TLANTIC COAST LINE RAILROAD COMPANY, Defendant-Appellant.

Petition for Writ of Error and Allowance.

Atlantic Coast Line Railroad Company, the above named defend-nt-appellant, respectfully shows that on the 3d day of April, 1915, ne Supreme Court of South Carolina, which is the highest court in ne state in which a decision in the action referred to herein could e had, rendered a judgment against your petitioner in a certain tion in which Lizzie M. Mims, administratrix of the estate of John Mims, deceased, was plaintiff and your petitioner, Atlantic Coast ine Railroad Company, was defendant; and that on 13th day of ay, 1915, petition for rehearing duly filed by this defendant was smissed. In said action a right, privilege and immunity was duly t up and claimed by your petitioner under the constitution and atute of the United States, and the decision of the Supreme Court South Carolina was against the right, privilege and immunity so t up and claimed, all of which will more fully and in detail appear om the assignment of errors filed herewith.

Wherefore, and inasmuch as your petitioner feels aggrieved 36 by the decision of the Supreme Court of South Carolina in rendering a judgment against it in this action, it respectfully ays that a writ of error may be issued from the Supreme Court of e United States to the Supreme Court of South Carolina for the rrecting of the errors complained of; that an order may be entered ing the amount of the supersedeas bond; that a duly authenticated anscript of the records of the proceedings herein in said Supreme urt of South Carolina be sent to the Supreme Court of the United ates at Washington, D. C., under rules of said court in such cases ade and provided; and that the decision and judgment of the Su-eme Court of South Carolina herein may be reversed and annulled, according to law and justice should be done.

P. A. WILLCOX,
L. W. McLEMORE,
BARRON, McKAY, FRIERSON & MOFFATT,
Attorneys for Atlantic Coast Line Railroad Company, Defendant.

ATE OF SOUTH CAROLINA:

In the Supreme Court.

Let the writ of error above prayed for issue upon the execution of bond by the Atlantic Coast Line Railroad Company payable to

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Lizzie M. Mims, administratrix of the estate of John J. Mims, deceased, in the sum of twenty-five thousand dollars ($25,000.00), such bond, when approved, to act as a supersedeas.

EUGENE B. GARY,
Chief Justice of the Supreme Court of South Carolina.

Dated this 8th day of July, 1915.

237 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

LIZZIE M. MIMS, Administratrix of the Estate of John J. Mims, Deceased, Plaintiff-Respondent,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, Defendant-Appellant.

Assignment of Errors and Prayer for Reversal.

Now comes Atlantic Coast Line Railroad Company, the above named defendant-appellant (plaintiff in error), and files herewith its petition for a writ of error and says that there are errors in the record and proceedings of the above entitled cause, and, for the purpose of having same reviewed in the Supreme Court of the United States, makes the following assignment:

That the Supreme Court of South Carolina erred regarding the application to this cause and the construction of the Federal Employers' Liability Act, to wit: "An Act entitled 'An Act relating to the Liability as Common Carriers by Railroads to their Employees in certain cases' approved 22nd of April, 1908, and the act amendatory thereto, approved 5th of April, 1910."

That by these errors the Supreme Court of South Carolina decided against certain titles, rights, privileges and immunities under said statutes, which were duly and specially set up and claimed by defendant (plaintiff in error) in these proceedings.

The said errors are more particularly set forth as follows:

238 I. That the Supreme Court of South Carolina erred in holding and deciding, and in thereby sustaining the court of common pleas for Richland county, that evidence to establish the interstate character of the employment of plaintiff's intestate in order to show that said action could only lie under and by virtue of the act of Congress, was inadmissible in the absence of specific averments to that effect in the complaint or answer.

Whereas the Supreme Court of South Carolina should have reversed the rulings and judgment of the lower court and held that such evidence, regardless of the pleadings, was admissible as a matter of substantive law. This was defendant's exception I, which was as follows:

"Exception I. His Honor, the presiding judge, refused to allow defendant to introduce testimony as follows:

"(*a*) W. B. Pryor (Train Dispatcher):

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"'Mr. McKay: State whether or not, from your record, on the morning in question there were trains passing through Sumter, Atlantic Coast Line, from without the state of South Carolina, and trains from within the state of South Carolina, going without the state.

"'Mr. Clifton: We object.

"'The Court: Objection sustained.

"'Mr. McKay: State whether or not that was the case between the hours of 8 and 10 in the morning of that day.

"'Mr. Clifton: Same objection.

"'The Court: Objection sustained.'

"(*b*) W. F. Flake (Flagman, freight train, Sumter to Robbins):

"'Mr. McKay: Was A. C. L. 2082 car in that train that morning?

"'Mr. Clifton: We object, irrelevant. He was not injured or killed by train going to Robbins.

"'The Court: Bringing in some interstate commerce; that is ruled out irrelevant, nothing to do with the case.

"'Mr. McKay: Was that car, A. C. L. 2082, a car filled with cotton and destined to Augusta on this trip?

"'Mr. Clifton: Do not answer.

"'The Court: Irrelevant.'

239 "(*c*) Carroll Brooks (Conductor Train No. 46):

"'Mr. McKay: State whether or not on that date (19th December) you carried certain passengers on mileage from Sumter to Lane.

"'Mr. Clifton: Do not answer; we object.

"'The Court: Irrelevant; he can not say; that is not defense for killing Mr. Mims in any shape or form.

"'Mr. McKay: Our purpose is to connect this mileage with interstate shipment.

"'The Court: I exclude it as irrelevant.'

(*d*) D. L. Lynch (Conductor Train No. 83, passing Lane) as follows:

"'Mr. McKay: State whether or not Lane on this day in question, you picked up three passengers, three mileage passengers, and carried them to Savannah, Georgia.

"'Mr. Clifton: The mileage itself would be the best evidence; and secondly, irrelevant.

"'The Court: One objection is enough; it is irrelevant.

"'Mr. McKay: You object to this as irrelevant? Have you got your original record with you?

"'A. My report that day.

"'The Court: The original record would not make it relevant.

"'Mr. McKay: It was objected to on the ground of the record.

"'The Court: I sustain the objection on the ground of irrelevancy; does not bear in any way on the defense for killing Mr. Mims, as alleged in the complaint, or stated in the answer."

"(*e*) R. H. Josey (Agent at Lane), as follows:

"'Q. State whether or not at that time the Georgetown & Western sold or exchanged any mileage over any other railroad.

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" 'Mr. Clifton: We object on the ground, irrelevant.
" 'The Court: Absolutely irrelevant in this case.'
"(*f*) G. C. Rumph (Baggage Master on Train No. 46), as follows:
" 'Q. Is it a fact that on this morning in question you had a trunk in charge that was to go out of the state of South Carolina?
" 'Mr. Clifton: We object.
" 'The Court: Overruled on the same ground. I think you gentlemen have about exhausted the number of witnesses you may offer on this point, taking up a vast amount of time.
" 'Mr. McKay: This is the last witness. State whether or not on this morning in question you had a trunk in charge checked from Sumter to Savannah.
" 'Mr. Clifton: Same objection.
" 'The Court: Same ruling.
240 " 'Mr. McKay: Does your record show that fact?
" 'Mr. Clifton: We object.
" 'Mr. McKay: We want to offer the record in evidence.
" 'Mr. Clifton: We object to the record on the ground, irrelevant.
" 'The Court: This case has been in the court how many years? How long since the case was started?
" 'Mr. Clifton: January, 1911.
" 'The Court: After this case *has* been passed upon before, an answer put in, and amended answer allowed, seems to have occurred to counsel that this court has no jurisdiction by reason of interstate commerce business. I can not understand that. I have overruled all this testimony. I am not going to hear any more of it now.
" 'Mr. McKay: You refuse to allow this original record to go in?
" 'The Court: Yes.
" 'Mr. Clifton: There is no testimony; it is original.
" 'Mr. McKay: He says it is.
" 'Witness: That is my record.
" 'Mr. McKay: In your own handwriting?
" 'A. Yes, sir.
" 'Mr. Clifton: Had you said so prior to just now?
" 'Mr. McKay: He had.
" '(Identified W. H. M.)
" 'Mr. McKay: Just identified to show we did offer this.
" 'Mr. Willcox: We want that identified as evidence of having offered the record.
" 'The Court: You will save time by putting the record in.
" 'Mr. Nelson: This is the original record, or copy; to make the record straight for purposes of appeal.
" 'The Court: Yes, no use to burden the record with a mass of printed documents.
" 'Mr. Clifton: We object to even the identification on the ground having been offered and rejected, no necessity to put them in.
" 'Mr. Willcox: State that was the record that was ruled out.
" 'The Court: You have enough evidence to raise the question, any question you want to make about the U. S. Supreme Court, enough has been offered.'

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"(g) J. S. Neggs (Railway Postal Clerk on Train No. 46), as follows:

"'Q. State if it is not a fact that on December 19, on that train, you, as mail clerk, put off at Lane and Sumter mail destined to points beyond South Carolina.

"'Mr. Clifton: We object.

"'The Court: I rule that out.'

241 "The ruling of this evidence constituted error in that it was relevant and competent to prove that plaintiff's intestate was engaged in inspecting trains engaged in interstate commerce and hence that this action falls within the terms of the act of Congress known as Employers' Liability act."

II. That the Supreme Court of South Carolina erred in holding and deciding and in thereby sustaining the rulings and judgment of the court of common pleas for Richland county that the defendant (plaintiff in error) could not introduce evidence to show that the cause herein came within the terms of the said Federal statute because said act was not pleaded or sufficient facts set forth in said pleadings to sustain such testimony, and thereby in further upholding the court of common pleas for Richland county in the ruling that the decisions of the Supreme Court of the United States touching thereupon were not binding on the courts of South Carolina.

Whereas the said Supreme Court of South Carolina should have held, decided and adjudged that the rulings and judgment of the court of common pleas for Richland county were erroneous and constituted reversible error in that it was not necessary to plead said act or facts to bring the cause of action under said act in order to show that the terms of the said Federal statute were applicable. This was defendant's exception II.

III. That the Supreme Court of South Carolina erred in holding and deciding that the defendant (plaintiff in error) could not on the trial of this cause be permitted to introduce evidence showing that both plaintiff's intestate and defendant were at the time of the death of plaintiff's intestate engaged in interstate commerce within the purview of the said Federal employers' liability act, in the absence of specific allegations in the pleadings raising such

242 issue; notwithstanding the fact that this cause of action was brought under Lord Campbell's act of the state of South Carolina, Sections 3955-3957, Volume I, Code of Laws, S. C., 1912, and that in undertaking to prove that plaintiff's intestate was at the time of his death engaged solely in intrastate commerce plaintiff herself had tendered such issue.

Whereas the said Supreme Court of South Carolina should have held, decided and adjudged that upon the issue so tendered it was competent for defendant to prove, in denial of plaintiff's proof, that plaintiff's intestate at the time of his death was engaged in interstate commerce.

For which errors, and other manifest errors appearing in the record, the defendant Atlantic Coast Line Railroad Company (plaintiff in error) prays that the said judgment of the Supreme Court of South Carolina in the cause herein, dated 3d day of April, 1915, and

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its order thereon of 13th day of May, 1915, be reversed and a j
ment rendered in favor of the defendant company, and for costs

P. A. WILLCOX,
L. W. McLEMORE,
BARRON, McKAY, FRIERSON &
MOFFATT,
Attorneys for Atlantic Coast Line Railroad
Company, Defendant (Plaintiff in Error

243 [Endorsed:] State of South Carolina. In the Supr
Court. Lizzie M. Mims, administratrix of the estate of J
J. Mims, deceased, Plaintiff-Respondent, v. Atlantic Coast Line
road Company, Defendant-Appellant. Petition for writ of e
order of allowance, assignment of errors and prayer for reve
Barron, McKay, Frierson & Moffatt, Attorneys at law, Tenth F
Union Bank Building, Columbia, S. C. Filed Supreme Cou
S. C. 13 July, 1915. U. R. Brooks, Clerk.

244 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

ATLANTIC COAST LINE RAILROAD COMPANY, Plaintiff in Erro
v.
LIZZIE M. MIMS, as Administratrix of the Estate of John J. M
Deceased, Defendant in Error.

Bond.

Know all men by these presents that we, Atlantic Coast Line
road Company, a corporation duly organized and existing under
by virtue of the laws of the state of Virginia, the principal offic
which is in the city of Wilmington, in the state of North Caro
as principal, and Fidelity & Deposit Company of Maryland, as su
are held and firmly bound unto Lizzie M. Mims as administr
of the estate of John J. Mims, deceased, in the full and just su
twenty-five thousand dollars ($25,000.00), for the payment of w
sum well and truly to be made we hereby jointly and severally
ourselves and each of our successors and assigns firmly by t
presents.

Sealed with our seals and dated this 5th day of June, A. D. 1

Whereas lately at a hearing had before the Supreme Cou
South Carolina in a suit pending in said court between the said L
M. Mims as administratrix of the estate of John J. Mims, dece
as plaintiff-respondent, and the said Atlantic Coast Line
245 road Company, as defendant-appellant, a final judgment
rendered against said Atlantic Coast Line Railroad Comp
and said Atlantic Coast Line Railroad Company seeks to prose
its writ of error to the Supreme Court of the United States to re
said final judgment:

Now, therefore, the condition of this obligation is such that if

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Atlantic Coast Line Railroad Company as plaintiff in error shall prosecute its said writ of error and answer all costs and damages that may be adjudged against it if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

ATLANTIC COAST LINE RAILROAD COMPANY, [SEAL.]

(Sgd.) By P. A. WILLCOX, *Att'y in Fact.*

Attest:

——— ———.

Witnesses as to Atlantic Coast Line Railroad Co.:

(Sgd.) A. L. HARDEE.
SIMEON HYDE.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

(Signed) By HENRY E. DAVIS, *Attorney in Fact.*

Attest:

——— ———.

Attest:

JAMES W. HOWARD, *Agent.* [SEAL.]

Witnesses as to Fidelity & Deposit Co. of Maryland:

A. L. HARDEE.
F. L. WILLCOX.

246 Bond approved and to act as supersedeas:
July 8th, 1915.

(Sgd.) EUGENE B. GARY,
Chief Justice Supreme Court, South Carolina.

Bond agreed to be satisfactory:

(Sgd.) NELSON & GETTYS,
Attorney- for Defendant in Error.

A true copy.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

247 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of South Carolina, Greeting:

Because in the record and proceedings, as in the rendition of the judgment of a plea which is in the said court, before you or some of you, being the highest court of law or equity of the state in which a decision could be had in the said suit between Lizzie M. Mims as

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administratrix of the estate of John J. Mims, deceased, and Atlan
Coast Line Railroad Company, a corporation, wherein was drawn
question the construction of a clause of the constitution and a stat
of the United States, and the decision was against the right, ti
privilege or exemption specially set up or claimed under such cla
of the constitution and the said statute; a manifest error hath h
pened to the great damage of the Atlantic Coast Line Railroad C
pany as by its complaint appears. We being willing that error
any hath been, should be duly corrected and full and speedy jus
done to the parties aforesaid in this behalf do command you, if ju
ment be therein given, that then under your seal distinctly
openly you send the record and proceedings aforesaid, with all thi
concerning the same, to the Supreme Court of the United States,
gether with this writ, so that you have the same in the Supre
Court at Washington, D. C., within thirty days from the date her
that the record and proceedings aforesaid being inspected, the s
Supreme Court may cause further to be done therein to correct t
error what of right and according to the laws and customs of
United States should be done.

248 Witness the Honorable Edward D. White, Chief Jus
of the Supreme Court of the United States, the 13 day
July, in the year of our Lord one thousand nine hundred and fift

[Seal United States District Court, Eastern District So. Ca.]

RICHARD W. HUTSON,
Clerk District Court of the United States,
Eastern District of South Carolina

Allowed:
EUGENE B. GARY,
Chief Justice of the Supreme
Court of South Carolina.

249 [Endorsed:] State of South Carolina. In the Supr
Court. Lizzie M. Mims, administratrix of the estate of J
J. Mims, deceased, Plaintiff-Respondent, v. Atlantic Coast Line R
road Company, Defendant-Appellant. Writ of error. Barron,
Kay, Frierson & Moffatt, attorneys at law, Tenth Floor Union B
Building, Columbia, S. C. Filed Supreme Court of S. C. 13 J
1915. U. R. Brooks, Clerk.

250 UNITED STATES OF AMERICA, *ss:*

Citation.

The President of the United States to Lizzie M. Mims, administra
of the estate of John J. Mims, deceased, Greetings:

You are hereby cited and admonished to be and appear before
Supreme Court of the United States at Washington, D. C., wit
thirty days from the date hereof, pursuant to a writ of error f
in the office of the Clerk of the Supreme Court of the State of So

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Carolina, wherein Atlantic Coast Line Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Eugene B. Gary, Chief Justice of the Supreme Court of South Carolina, this the 13 day of July, 1915.

EUGENE B. GARY,
Chief Justice of the Supreme Court of the State of South Carolina.

[Seal Supreme Court of South Carolina.]

Attest:
U. R. BROOKS,
Clerk of the Supreme Court of the State of South Carolina.

STATE OF SOUTH CAROLINA,
County of Richland:

We, the undersigned attorneys of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance for said defendant in rror in the Supreme Court of the United States this 14th day of July, 1915.

JOHN H. CLIFTON,
W. S. NELSON,
J. TEAM GETTYS,
Attorneys of Record for Lizzie M. Mims, Administratrix of the Estate of John J. Mims, Deceased.

251 [Endorsed:] State of South Carolina. In the Supreme Court. Lizzie M. Mims, administratrix of the estate of John J. Mims, deceased, Plaintiff-Respondent, v. Atlantic Coast Line Railroad Company, Defendant-Appellant. Citation. Barron, McKay, Frierson & Moffatt, attorneys at law, Tenth Floor Union Bank Building, Columbia, S. C. Filed Supreme Court of S. C. 13 July, 1915. U. R. Brooks, Clerk.

252 UNITED STATES OF AMERICA,
Supreme Court of South Carolina, ss:

LIZZIE M. MIMS, Administratrix of the Estate of John J. Mims, Deceased, Plaintiff-Respondent,
against
THE ATLANTIC COAST LINE RAILROAD COMPANY, Defendant-Appellant.

Certificate of Lodgment.

I, U. R. Brooks, Clerk of the said Court, do hereby certify that there was lodged with me as such Clerk on the — day of July, 1915,

CLOSE IN CENTER

in the matter of Lizzie M. Mims, Administratrix of the estate of John J. Mims, Deceased, against the Atlantic Coast Line Railroad Company:

1. The original bond, of which a copy is herein set forth.

2. Two copies of the Writ of Error as herein set forth, one for Plaintiff and one to file in my office.

In Testimony Whereof I have hereunto set my Hand and affixed the Seal of said Court at my office in Columbia, South Carolina, this 10 day of August, 1915.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of South Carolina.

253 UNITED STATES OF AMERICA,
Supreme Court of South Carolina, ss:

LIZZIE M. MIMS, Administratrix of the Estate of John J. Mims, Deceased, Plaintiff-Respondent,
against
THE ATLANTIC COAST LINE RAILROAD COMPANY, Defendant-Appellant.

Return

In obedience of the command of the within Writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record of the proceedings in the within entitled case, together with all things concerning same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of South Carolina, in the City of Columbia, this 10 day of August, 1915.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of South Carolina.

254 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

LIZZIE M. MIMS, Administratrix of the Estate of John J. Mims, Deceased, Plaintiff-Respondent,
against
THE ATLANTIC COAST LINE RAILROAD COMPANY, Defendant-Appellant.

Præcipe.

To U. R. Brooks, Esq., clerk of the Supreme Court of the State of South Carolina:

The plaintiff in error, defendant appellant above entitled, requests that you incorporate into the transcript of the record which you are

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to send to the Supreme Court of the United States in accordance with the directions contained in the Writ of Error in the above stated case now on file in your office, the following:

I. That portion of the printed Case for Appeal commencing at the beginning, on page 1, down through the conclusion of the testimony of the witness J. J. Dunlap, page 17.

II. Omit that portion of the printed transcript on page 17, beginning with the testimony of Joe B. White, down to testimony of Hunter Hodge, page 27.

III. Incorporate that portion of the printed transcript, pages 27 and 28, which includes the testimony of Hunter Hodge.

IV. Omit that portion of the printed transcript beginning
255 on page 28 and concluding on page 31, which includes the testimony of James Miller.

V. Incorporate that portion of the printed transcript from folio 121, page 31, down through folio 162, page 41, including all of the testimony of H. G. McKagen.

VI. Omit that portion of the printed transcript beginning on page 41, with the testimony of J. A. Davis, down to folio 194, page 49, beginning: "Mr. Willcox: We make this statement to the court, etc., etc."

VII. Incorporate that portion of the printed transcript folio 194, page 49, beginning: "Mr. Willcox: We make this statement to the Court, etc., etc.," down to folio 250, page 63, concluding the testimony of J. S. Neggs.

VIII. Omit that portion of the printed transcript beginning with the testimony of L. M. Allen, page 63, down to page 184, headed "Motion for Direction of Verdict."

IX. Incorporate the remainder of the printed Case for Appeal beginning at page 184, to the end, concluding with the Agreement, on page 207, omitting therefrom the Exceptions 3, 4, 5 and 6, beginning at folio 809, on page 203, and ending at folio 824, on page 206.

P. A. WILLCOX,
L. W. McLEMORE,
CHAS. H. BARRON,
DOUGLAS McKAY,
Attorneys for the Atlantic Coast Line Railroad Company, Plaintiff in Error.

We, the Attorneys of record for Lizzie M. Mims, Administratrix of the Estate of John J. Mims, Deceased, Defendant in Error, acknowledge service of the above and foregoing præcipe, and
256 we further stipulate and agree that the transcript as within specified to be made up by the Clerk of the Supreme Court of South Carolina contains all of the record and testimony presented to the Supreme Court of South Carolina that in any wise pertains or relates to the questions to be presented to the Supreme Court of the United States on this Writ of Error.

JOHN H. CLIFTON,
W. S. NELSON,
J. TEAM GETTYS,
Attorneys for Lizzie M. Mims, Administratrix of the Estate of John J. Mims, Deceased, Defendant in Error.

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257 Supreme Court of the United States, October Term, 1915.

No. 629.

ATLANTIC COAST LINE RAILROAD COMPANY, Plaintiff in Error,
vs.
LIZZIE M. MIMS, Administratrix of the Estate of John J. Mims, Deceased, Defendant in Error.

Stipulations as to Printing Record.

It is stipulated and agreed by and between P. A. Willcox, Douglas McKay and Lucian W. McLemore, counsel for plaintiff in error, and Jo. Berry Sloan Lyles, W. S. Nelson, J. T. Gettys and John H. Clifton, counsel for defendant in error, that in order to save expense in the printing of the record herein, that the following portions of the record as certified to the Clerk of the U. S. Supreme Court by the Clerk of the Supreme Court of South Carolina, be omitted from the printed record in the U. S. Supreme Court—said omitted portions not being necessary in consideration of the errors complained of, to wit:

1. Omit that portion of the transcript on page 17 (same being page 17 of the printed case for appeal to the Supreme Court of South Carolina), beginning with the testimony of Joe B. White, down to testimony of Hunter Hodge, on page 27.

2. Omit that portion of the transcript (same being the printed case for appeal to the Supreme Court of South Carolina), beginning on page 28 and ending on page 31, which includes the testimony of James Miller.

3. Omit that portion of the transcript (same being the printed case for appeal to the Supreme Court of South Carolina), begin-
258 ning on page 41, with the testimony of J. A. Davis, down to folio 194, page 49, beginning: "Mr. Willcox: We make this statement to the Court, etc. etc."

4. Omit that portion of the transcript (same being the printed case for appeal to the Supreme Court of South Carolina), beginning with the testimony of L. M. Allen, page 63, down to page 184, headed "Motion for Direction of Verdict."

5. Omit that portion of the transcript (same being the printed case for appeal to the Supreme Court of South Carolina), beginning with "Exception 3," on page 203, and continuing to the end of page 206.

No.* L. W. McLEMORE,
P. A. WILLCOX,
No.* DOUGLAS McKAY,
No.* CHAS. H. BARRON,
Counsel for Plaintiff in Error.
No.* WM. S. NELSON,
No.* J. T. GETTYS,
No.* JOHN H. CLIFTON,
O K.* JO. BERRY SLOAN LYLES,
Counsel for Defendant in Error.

* In pencil in copy.

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9 [Endorsed:] File No. 24,912. Supreme Court U. S., October term, 1915. Term No. 629. Atlantic Coast Line R. R. ., Pl'ff in Error, vs. Lizzie M. Mims, Adm'x, etc. Stipulation as printing record. Filed January 3, 1916.

0 UNITED STATES OF AMERICA,
Supreme Court of South Carolina, ss:

LIZZIE M. MIMS, Administratrix of the Estate of John J. Mims, Deceased, Plaintiff-Respondent,
against
THE ATLANTIC COAST LINE RAILROAD COMPANY, Defendant-Appellant.

Authentication of Record.

I, U. R. Brooks, Clerk of the said Court, do hereby certify that foregoing pages, numbered from 1 to 207, inclusive, are a full d complete transcript of the record and proceedings in the case Lizzie M. Mims, Administratrix of the Estate of John J. Mims, ceased, Plaintiff-Respondent, against the Atlantic Coast Line Rail-d Company, Defendant-Appellant, and also of the opinion of the urt rendered therein, and of the petition and amended petition for earing, and of the orders of the Court thereon, as the same now pear on file in my office, with the exception of the Writ of Error, Citation and Assignment of Errors and Prayer for Reversal here-h attached, which are the original Writ, Citation and Assign-nt and Prayer.

In Testimony Whereof I have hereunto set my Hand and affixed Seal of the said Court at my office in Columbia, South Carolina, 10 day of August, 1915.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of South Carolina.

Endorsed on cover: File No. 24,912. South Carolina Supreme urt. Term No. 629. Atlantic Coast Line Railroad Company, intiff in error, vs. Lizzie M. Mims, as administratrix of the estate John J. Mims, deceased. Filed September 13, 1915. File No. 912.

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INDEX TO CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 629.

ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

LIZZIE M. MIMS, AS ADMINISTRATRIX OF THE ESTATE OF JOHN J. MIMS, DECEASED, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error, Lizzie M. Mims, as administratrix of the estate of John J. Mims, deceased, by her counsel, Jo-Berry S. Lyles, John H. Clifton, W. S. Nelson and J. Team Gettys, appearing in her behalf, and moves the Court to dismiss the writ of error in the above entitled case, for want of jurisdiction and upon the grounds set forth in the brief filed herewith.

The defendant in error further moves the Court to affirm the judgment rendered by the Supreme Court of the State of South Carolina, upon the ground that it is manifest that the writ of error was taken for delay only, and that the questions from which the decision of the cause depends are so frivolous as not to need further argument.

The defendant in error further moves the Court, in the event that it should desire to hear argument on the questions involved, that this cause be transferred to the summary docket and there be proceeded with on the ground that the cause is of such a character as not to justify extended argument.

The grounds of this motion, the statement of the case and the argument thereon, are more fully set forth in the accompanying brief, all of which is respectfully submitted herewith.

JO-BERRY SLOAN LYLES,
WILLIAM S. NELSON,
J. TEAM GETTYS,
JOHN H. CLIFTON,
Attorneys for Defendant in Error.

To Messrs. P. A. Willcox, Lucien W. McLemore, Charles H. Barron and Douglas McKay, Attorneys for Atlantic Coast Line Railroad Company, Plaintiff in Error:

Dear Sirs: Please take notice that on Monday, the —— day of April, A. D. 1916, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for its decision.

Attached hereto please find copy of the motion to dismiss or affirm, the brief and argument to be submitted in support thereof, and also the motion to transfer this cause to summary docket, if the Court should desire to hear argument thereon.

JO-BERRY SLOAN LYLES,
WILLIAM S. NELSON,
J. TEAM GETTYS,
JOHN H. CLIFTON,
Attorneys for Defendant in Error.

The foregoing notice is hereby accepted and delivery of a copy thereof, together with the above mentioned motion and brief therein mentioned, are hereby acknowledged this —— day of March, A. D. 1916.

.....

Attorneys for Atlantic Coast Line Railroad Company, Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 629.

ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

LIZZIE M. MIMS, AS ADMINISTRATRIX OF THE ESTATE OF JOHN J. MIMS, DECEASED, DEFENDANT IN ERROR.

STATEMENT OF DEFENDANT IN ERROR.

This suit was commenced in the Court of Common Pleas for Richland county, South Carolina, in April, 1911. The action was brought by Lizzie M. Mims, as administratrix of the estate of her husband, John J. Mims, to recover damages for herself and four minor children on account of the death of her husband on December 19, 1910, alleged to have been caused by the joint and concurrent carelessness, negligence, recklessness, wilfulness and wantonness of the defendants, Atlantic Coast Line Railroad Company and S. B. Divine, in that (1) while John J. Mims, the deceased, was crossing Harvin street, a public street of the city of Sumter, S. C., the defendant, Atlantic Coast Line Railway Company, ran backwards one of its engines and tender on one of its tracks across said Harvin street, at an excessive and reckless rate of speed and in violation of its own rules and regulations as to speed; (2) in running said engine and tender backwards without having anyone on the rear of said engine or tender to keep a lookout in the direction in which said engine and tender were being run, and in violation of its own rules:

(3) that the bell was not rung or the whistle blown on approachin Harvin street (where John J. Mims was killed), a public crossing and no signal or warning whatever of the approach of said engin and tender was given as required by law; (4) that the engine wa not stopped when the engineer (S. B. Divine), saw or should hav seen that John J. Mims would be run into and over if said engin was not stopped (R., pp. 1-3).

The case was first tried in the Court of Common Pleas for Rich land county, in April, 1912, when, at the close of all testimony, nonsuit was ordered by the trial Judge. Upon appeal this order o nonsuit was reversed by the Supreme Court of South Carolina an the case sent back for a new trial. *Mims* v. *A. C. L. R. R. et al* 95 S. C., 370, 78 S. E. 1031. The second trial was had in th Court of Common Pleas for Richland county, ———, 1914, an resulted in a verdict for plaintiff, defendant in error herein, fo sixteen thousand ($16,000) dollars (R., p. 1).

It was developed by testimony brought out at this trial that Mim the deceased, was a car inspector at the time he was killed, in th employ of the Atlantic Coast Line Railroad Company, in its yard at Sumter, S. C. That one of his duties was to inspect trains upo their arrival in the yards, and at the time he was killed he wa going across the tracks of the defendant in defendant's yards a Sumter, S. C., on Harvin street, a public street of the city of Sum ter, S. C., where it crosses the railroad tracks of the defendant, an was going diagonally from the Gibson train, which was already i the yard, to the Orangeburg train, which had just arrived, an supposedly for the purpose of inspecting it. There was no affirma tive evidence as to where Mims was going when he received th injuries which resulted in his death. He was killed by a detache switch engine in charge of the defendant, S. B. Divine, workin on the Sumter yard. The Orangeburg train runs from Orangebur by way of Sumter and Lanes to Florence and return, all within th State of South Carolina (R., pp. 8-10, 12-14).

This action was brought by the plaintiff for the death of plain tiff's intestate as a member of the general public and not under th Federal Employers' Liability Act, against the Atlantic Coast Lin Railroad Company as a corporation, and S. B. Divine, a citizen o the State of South Carolina, as an individual. Both the corporat and personal defendants filed separate answers setting up the sam defenses. The plaintiff's recovery does not exceed the pecuniar loss to herself and children. Affirmative answers to the qestion propounded by the plaintiff in error to the several witnesses woul not have established the fact that plaintiff's intestate, at the time o

his death, by reason of the carelessness of S. B. Divine, in running the shifting engine, was engaged in interstate traffic.

In going from the Gibson train in the direction of the Orangeburg train, Mims, the deceased, had to cross Harvin street, one of the main thoroughfares of the city, a much traveled place, and a place where he had a right to be and to expect that he would be protected, particularly against shifting engines.

A more detailed statement of the facts of the case is not necessary, in that the assignments of error herein, which will be considered later, concern only the refusal of the trial Judge to allow the plaintiffs in error to introduce testimony at the trial which they claim would show or tend to show that John J. Mims, the deceased, was engaged in interstate commerce at the time of his death.

At the first trial of this case, and in the appeal therefrom, 95 S. C., 370, no mention was made of the Act of Congress—Federal Employers' Liability Act—and if the defendants had any defense under that Act it was as available to them on the first trial as at the second trial. Not only was no mention of the Federal Act made during the first trial and the appeal, but at the second trial the defendants asked leave of the Court, and over objection of plaintiff, were permitted to amend their answers by setting up the defense of gross and wilful contributory negligence of the plaintiff's intestate under the South Carolina statute (R., p. 5).

It will be observed that the complaint states no facts that would make the Federal Employers' Liability Act applicable—it is not even alleged that plaintiff's intestate was an employee of the defendant railroad company, and so far as the pleadings show and the issue made by plaintiff, he occupied the position of one of the general public killed at a public crossing, nor is it alleged that the defendant railroad company was an interstate carrier; the allegation in paragraph 3 of the complaint being that the defendant railroad company owned, controlled and operated a certain line of railroad * * * extending from and through the city of Sumter, in the county of Sumter, State of South Carolina, to the city of Columbia, in the county of Richland, in the State of South Carolina. The answer of the defendant states no facts which would show that the Federal Employers' Liability Act has any application. It in effect admits that the defendant is an intrastate carrier, and plaintiff's intestate was killed by one of defendant's engines at Sumter, S. C., on the 19th day of December, 1910, and, of course, denies the allegations of neglect or disregard of duty. It further sets up the defense of contributory negligence generally, and the further defense under the South Carolina statute of gross and wilful negligence on the part

of plaintiff's intestate, Section 3230, Code of Laws S. C. 1912, which statute applies to injuries received at a public crossing (Appendix 15).

The plaintiff's case was stated under the South Carolina statute, Lord Campbell's Act, Sections 3955-7, Code of Laws S. C. 1912—(Appendix 15) and was stated without reference to the employment of plaintiff's intestate, but as if he were one of the general public.

At the close of plaintiff's testimony, the attorneys for the defense prefaced their offer of evidence with a statement that they would offer testimony to show that plaintiff's intestate was engaged in interstate commerce, introducing such evidence solely for the purpose of showing that the statute under which plaintiff brought her action had been superseded by the Act of Congress. His Honor, the trial Judge, took the position that the testimony offered was irrelevant, not responsive to the pleadings and not an issue in the case, and in effect that under the State practice he would exclude same. No motion for amendment was made (R., pp. 21-31).

Thus was brought up the question before the Supreme Court of South Carolina as to whether or not, under the State practice, it was necessary to plead the Federal Act, or such facts as would make the Act applicable, if the defendant intends to invoke that Act as a defense.

DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

The Supreme Court of the State of South Carolina, on appeal, 100 S. C., 375, 85 S. E., 372, held:

> "Exceptions 1 and 2 allege error on the part of the presiding Judge in refusing to allow certain testimony, which the appellants contend would show that when plaintiff's intestate was killed he was engaged in interstate commerce, and in refusing to allow testimony which defendants' counsel stated they would offer for the purpose of bringing the case under the Employers' Liability Act, and the remarks of the Judge at that time. His Honor took the position that the testimony was irrelevant, and not responsive to the pleadings and not an issue in the case. That the case had been passed upon by the Supreme Court and an amendment, over objection of plaintiff, allowed just before proceeding with the second trial. After the plaintiff's testimony was all in, for the first time it seems to have occurred to the defendants that they wanted to avail themselves of the Federal Statute, Employers' Liability Act. The facts in every case should be pleaded. Whenever the

pleadings show facts pleaded that the case is one that can be tried either under the Federal or State law, then the Court can try it under either law. When the pleadings show facts that bring it under the Federal law, it must be tried under the Federal law, and when the pleadings show it is brought under the State law, it must be tried under that law.

The complaint was filed April 5, 1911, and alleges deceased was killed December 19, 1910, and alleges defendants controlled and operated its railroad in the counties of Sumter and Richland, and cities of Sumter and Columbia, S. C., and it nowhere alleges that the defendants operated its road in any other State than South Carolina, and there is no allegation in the complaint whereby it could be inferred that defendant railroad was engaged in interstate commerce, but the complaint clearly alleges that at the time of the death of the deceased it was engaged in intrastate business. The defendants answered without alleging that at the time the deceased was killed, while in their employment, that he was engaged in the inspection of a car which was engaged in interstate commerce. These facts must have been known, or should have been known, to them if they existed. They try the case in 1912, before Judge Spain, defendants obtain a nonsuit, which, upon appeal, is reversed, and the case is ripe for a trial before Judge Memminger, and a motion to amend answer is made and allowed, and still no effort made to set up this defense and advertise the plaintiff of this defense. It does seem to us that justice and fair dealing under all of the circumstances of the case should have been required the defendants if they intended to invoke the benefits, which they thought would ensue to them under the Act of Congress to plead the facts applicable to bring it under the Act. It would be an injustice at this stage of the case to allow this defense. The plaintiff alleged he was engaged in intrastate commerce when he was killed. The first trial showed that he was. When his Honor, in the exercise of his discretion, allowing the defendants to amend their answer permitting them all they asked for, there was no hint or suggestion that he was engaged in interstate commerce. If he was, the information was, or should have been, known to them, and if they desired to raise this issue they should have set forth such allegations in their answer as to raise an issuable fact, but this they failed to do, but knowing that the plaintiff, by her pleadings, based her case on the State law, and after a trial under that law and an appeal without any reference or suggestion even or allegation

being made to the Federal Employers' Liability Act, or that the deceased at the time of his injury was engaged in interstate commerce waits until close of plaintiff's testimony in the second trial, and, without even seeking to amend their answer, attempt to bring into the case by introducing evidence and seek a direction of a verdict upon a ground not pleaded. The plaintiff alleges that she has a cause of action against the defendants and is entitled to a trial either under the State or Federal law, the pleadings made out a case to be tried under the State law, and under the pleadings his Honor was correct in ruling as he did. It is not necessary to plead either a State or Federal statute, but it is necessary to plead facts which bring it under one or the other, and when the pleadings show that it was interstate commerce the State or Federal Courts try it and Federal law governs, when the pleadings show it was intrastate commerce the State law governs. The defendants should have pleaded the Federal Act, or, at least, such facts as would render the Act applicable, and inasmuch as they did not do so, and the pleadings made out a case based on the State law, the exclusion of the evidence by his Honor complained of was proper, as it was not responsive to any issue raised by the pleadings. If there had been an allegation in the answer that brought it within the Federal Employers' Liability Act, it would have been controlled by the Act, although the provisions may not have been referred to in express terms in the pleadings, and proof would be allowed in the case, but in this case there is no such allegation, and his Honor committed no error, and these exceptions are overruled."

ARGUMENT.

We submit that the decision of the South Carolina Supreme Court is sound and in accord with authority, and will not be reviewed by this Court; that no Federal question was raised or passed upon in the South Carolina Court.

The case at bar is on all fours with *Bradbury* v. *C., R. I. & P. Ry. Co.*, 149 Iowa, 51, 128 N. W., 1, which case was brought to this Court on a writ of error—*C., R. I. & P. Ry. Co.* v. *Bradbury*, 223 U. S. 711, 56 L. Ed., 624, where, in a memorandum opinion, the writ was dismissed for want of jurisdiction. The case now before the Court is even stronger than the Bradbury case, for there the testimony seeking to bring the case under the Federal Act was admitted and subsequently struck out, on the ground that whether the plaintiff was engaged in interstate commerce was not an issue.

The defendant offered to amend its answer so as to make it an issue. In the case now before the Court the testimony which the plaintiff in error sought to introduce was not admitted, and plaintiff in error, defendant below, did not seek to amend its answer to make the issue.

While in the Bradbury case this Court filed only a memorandum decision, dismissing the writ for want of jurisdiction, an examination of the record, and briefs filed show the case to be almost identical with the case now before the Court, and the Federal question there was sought to be raised in the same manner.

The decisions relied upon below by plaintiff in error: *M. K. & T. R. Co.* v. *Wulf*, 226 U. S., 570, 57 L. Ed., 335; *St. L. & C. R. Co.* v. *Hesterley*, 228 U. S., 702, 57 L. Ed., 1031; *St. L. S. F. T. R. Co.* v. *Seale*, 229 U. S., 156, 57 L. Ed., 1120; *N. C. R. R. Co.* v. *Zachry*, 232 U. S., 248, 58 L. Ed., 591; *Grand Trunk W. R. Co.* v *Lindsay*, 233 U. S., 44, 58 L. Ed., 838; *Toledo & St. L. R. Co.* v. *Slavin*, 236 U. S., 454, 59 L. Ed., 671, it was contended, sustained its position that the Federal Act, or facts making it applicable need not be pleaded, but that the benefits of the Act could be invoked under a general denial. We submit, however, in those cases the Federal Act, or facts making that Act applicable, were pleaded, or else the State Supreme Court considered the construction and application of the Act properly raised before it, and rendered decision upon it, and this Court passed upon the question only in view of a State Court having considered or assumed the record sufficiently presented a question of Federal right.

In the *Wulf* case it was set up in defendants' answer that the deceased was in the employ of defendant engaged in interstate commerce, and that the cause of action was governed by the Federal Act.

In the *Hesterly* case the Court holds the Federal question may be deemed to have been presented with sufficient clearness to sustain a writ of error from the Federal Supreme Court to a State Court, where the State Court has held that the question was sufficiently raised and decided. At the trial the defendant asked for ruling that plaintiff could not recover damages for pain under the second count. which was denied. The Supreme Court of Arkansas treated the request as intending to raise the question of whether the Federal Employers' Liability Act displaced the State law, and held that the Act was only supplemental, and that the judgment could be held under the State law. 98 Ark., 240. The Supreme Court of the United States says:

"The plaintiff contends that the claim of right under the law of the United States, and against that under the law of the State, was not presented with clearness enough to save it, *but as the Supreme Court held the question sufficiently raised and decided it*, that objection is not open here." (Italics ours.)

In the *Zachery* case, *supra*, it appears that the *defendant's answer, besides denying the allegations of negligence, set up a special defense that at the time plaintiff's intestate was killed he was engaged in interstate commerce as an employee upon the train of defendant lessee, and that under the Federal Employers' Liability Act the plaintiff was not entitled to recover.* At the close of the plaintiff's testimony, defendant moved for a nonsuit upon the ground that the plaintiff was engaged in interstate commerce, that the Act of Congress was exclusive and regulated the liability of defendant and plaintiff had failed to make out a case of liability under the Act. The Court denied the motion and held the case was brought under the statute of North Carolina, and that the Federal Act had no application and the case was triable under the State statutes. The Supreme Court of the United States says:

"In support of the judgment, it is earnestly argued that the question whether deceased was employed in interstate commerce was not properly raised in the trial Court, in accordance with the pertinent provisions of the local Code of Civil Procedure. *But this is a question of State practice; and since it appears that defendant expressly claimed immunity by reason of the Act of Congress, and the highest Court of the State either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right, the decisions of this Court render it clear that it is our duty to pass upon the merits of the Federal question.*" (Italics ours.)

In the *Lindsay* case, *supra*, the Uinted States Supreme Court says:

"In the trial Court it is insisted the operation and effect of the Employers' Liability Act upon the rights of the parties was not involved because that Act was not in express terms referred to in the pleadings or pressed at the trial, and was, hence, not considered by the Court in acting upon the requested charge, and, therefore, it is urged, it was error in the reviewing Court to test the correctness of the ruling of the trial Court by the provisions of the Employers' Liability Act instead of confining the subject exclusively to the safety appliance law and the rules of the common law governing negligence. But the want of foundation for this contention becomes apparent when it is

considered that *in the complaint it was expressly alleged, and in the proof it was clearly established that the injury complained of was suffered in the course of the operation of interstate commerce, thus bringing the case within the Employers' Liability Act.*" (Italics ours.)

On petition for rehearing in the State Supreme Court plaintiff in error urged the decision of this Court in *Toledo & St. L. R. Co.* v. *Slavin*, 59 U. S. (L. Ed.), 671. In that case the plaintiff alleged that the injuries were received by him in the performance of his duties as an employee of the railroad company. Testimony showing that the train on which plaintiff was riding at the time of his injury was engaged in interstate commerce was admitted, and thereupon the railroad insisted that the case was governed by the provisions of the Federal Act, and moved the Court for a verdict in its favor, which motion was overruled, and then the defendant requested the Court to charge the jury several applicable extracts from the Federal statute, all of which were refused. There was a vrdict for the plaintiff, and on writ of error to the Circuit Court of Lucas county that Court held that inasmuch as the plaintiff was injured while engaged in interstate commerce the case was governed by the Federal statute, and that a verdict should have been directed for the defendant. Upon appeal to the Supreme Court of Ohio, the judgment was reversed, and that of the trial Court affirmed without opinion.

In support of the State Court, it was contended that the judgment being reversed without opinion, it should not be construed as meaning that the State Court decided the Federal question adversely to the company's claim, but rather as holding that the defendant's failure to plead the Employers' Liability Act made it improper to consider evidence that plaintiff had been engaged in interstate commerce, and, hence, there was nothing properly in the record to support the contention that the defendant had been deprived of a Federal right.

This Court says:

"But a controlling Federal question was necessarily involved. For when the plaintiff brought suit on the State statute the defendant was entitled to disprove liability under the Ohio Act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law."

It will be seen from the foregoing that in the Slavin case a Federal question was raised in the State Court, in that the testimony bringing the case under the Federal Act was admitted by the State Court, and that an intermediate appeal Court passed upon the question, showing, as was said by this Court in the *Hesterly* case, *supra*, to the effect that the State Court, having held that the question was sufficiently raised and having decided it, that the claim of Federal right had been presented with sufficient clearness.

The Slavin case cites *St. Louis, S. F. & T. Co.* v. *Seal*, 229 U. S., 156. That was a case under the Texas statute. Neither the pleadings of the plaintiff nor defendant presented any issue for the construction or application of the Federal Act. The defendant railroad company entered special exceptions to plaintiff's petition on the ground that the petition did not show that at the time of the accident whether or not defendant was engaged in interstate commerce, and whether or not he was engaged in handling such commerce—that whether State or Federal statute applied depended upon facts not stated, and asked that the plaintiff be required to state the facts as to enable defendant to perceive which statute was relied upon. This motion was overruled. Evidently the motion in the Seal case is what, under the South Carolina practice, would have been a motion to elect, or a motion to make the complaint more definite and certain, and it seems was made before the introduction of testimony by either party, which certainly advertised the plaintiff of an issue to be raised by the defendant and put the plaintiff where he could have elected to rely on either or both statutes by making appropriate allegations. In any event, it seems that without objection evidence was admitted which clearly showed that plaintiff's intestate was engaged in interstate commerce at the time of his death.

Further in the Seal case the Texas Court considered the testimony and decided that plaintiff's intestate at the time of his death was not engaged in interstate commerce, and this Court says:

> "In its opinion on the motion for rehearing the Court (Texas) recognized the supremacy of the Federal statute if applicable, and held that the evidence did not bring the case within that statute."

It will be observed that the complaint in the case at bar does not even allege that plaintiff's intestate was an employee of the defendant, nor is there such allegation in the answer. In the complaint plaintiff's intestate is treated as a member of the general public killed by the negligence of the defendant at a public crossing, hence

the complaint was not demurrable, nor was there any ground for making the allegations more definite and certain, but facts which would have made the Federal Act applicable should have been set forth in answer.

In an exhaustive note to *S. A. L. R. Co.* v. *Horton*, L. R. A., 1915c, pages 78, 79, the author sustains our position that where an action is brought under the State law the applicability of the Federal Act is not put in question by a general denial, but can only be raised by an affirmative pleading or by pleading facts showing its applicability. This note cites the case of *Pelton* v. *Ill. C. R. Co.*, 150 N. W., 236, in which the Court says:

"By the Federal enactment, an employee plaintiff who has a good cause of action has been put in an anomalous position. He does not necessarily know, and frequently does not know, whether at the time of his injury the commerce in which he was engaged was interstate or not. That fact is peculiarly within the knowledge of the defendant employer. Two doors of remedy are set before him. But they are not cumulative; neither are they optional. Only one is available to him. He cannot choose. He can only try. If driven back from the one he has at least the assurance that he may enter the other; but, whichever door he enters, he comes before the same Court. He brings the same case before it. The door of entry only determines the rule of measure of the relief granted. The reason for appropriate pleading by the defendant on this question of abatement is precisely the same whether the plaintiff knocks first at the Federal door or at the other. If challenged at the first, the plaintiff may prefer to acquiesce and to enter by the other door; and this ought to end the issue on that question. *Vice versa*, if plaintiff brings his action under the Federal Act by appropriate allegation, and the defendant acquiesces, this also ought to end the issue on such question. If the defendant desires to make issue on such question, it should be done unequivocally. He should not be permitted to spread the net of a mere general denial, so as to hold in reserve the question of abatement, and in that manner to render it equally available in a second action as in the first. Under cover of such a method of pleading, the defendant might abate both actions successively, the first through plaintiff's failure of proof of the interstate character of the commerce, and the second through defendant's conclusive proof of such character.

> A method of pleading which would permit such mobility to an abatement defense carries its own condemnation."

Roberts Injuries to Interstate Employees, at pages 279-80, discusses the Seal case, *supra*, and quotes the following language from this Court in reversing the Texas Court:

> "It comes, then, to this: the plaintiff's petition as ruled by the State Court stated a case under the State statute. * * * When the evidence was adduced it developed that the real case was not controlled by the State statute, but by the Federal statute. In short, the case pleaded was not proved, and the case proved was not pleaded."

The same author goes on to state the following rule with authorities to sustain it, and which shows wherein the case at bar is differentiated from the Seal case:

> "On the other hand, if the plaintiff's petition states a cause of action under the laws of the State and his evidence establishes and is in harmony with the allegations of the petition, the fatal variance in plaintiff's proof, which appeared in the cases cited in the preceding paragraph, is not existent and the defendant in error, to defeat a recovery under the statute by showing that the case is one arising under the Federal Act, must plead the facts showing that plaintiff at the time of the injury was employed in interstate commerce, and that the carrier was so engaged at said time. Unless such plea is made such evidence is not admissible on behalf of the defendant. * * *"

We submit that our contention, that the pleadings must show some facts, either in complaint or answer, which bring the case under the Act of Congress, and if such facts are not set forth either in the original pleadings or by amendment (which amendment, in most instances, will be allowed even during trial) no Federal question is raised if the State Court under its practice refuses to permit evidence to bring the case under the Federal Act, but proceeds with the trial under the State statute.

Kansas City W. R. R. Co. v. *McAdow*, 60 U. S. (L. Ed.), 252, decided January 31, 1916.

Central Vermont Ry. Co. v. *White*, 238 U. S., 507, 59 L. Ed. 1433.

Wabash R. Co. v. *Hayes*, 234 U. S., 86, 58 L. Ed., 1227.

So. Ry. Co. v. *Bennett*, 233 U. S., 80, 58 L. Ed., 860.

Brinkmeier v. *M. P. Ry. Co.*, 224 U. S., 268, 56 L. Ed., 758.
Bradbury v. *C. R. I. & P. Ry. Co., supra.*
Fleming v. *N. C. R. Co.*, 106 N. C., 196.

Respectfully submitted,

JO-BERRY SLOAN LYLES,
WILLIAM S. NELSON,
J. TEAM GETTYS,
JOHN H. CLIFTON,
Attorneys for Defendant in Error.

APPENDIX.

Section 3230, Volume I, Code of Laws of South Carolina 1912:

"Injuries at Crossings—Penalty and Damages.—If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding section, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law; and that such gross or wilful negligence or unlawful act contributed to the injury."

Sections 3955-57, Volume I, Code of Laws South Carolina 1912, known as Lord Campbell's Act:

"Section 3955. Civil Actions for Wrongful Acts Causing Death.—Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony.

"Section 3956. Beneficiaries of Action for Wrongful Death—Damages Recoverable—Distribution.—Every such action shall be for the benefit of the wife or husband and child, or children, of the person whose death shall have been so caused; and if there be no such wife, or husband, or child, or children, then for the benefit of the parent or parents; and if there be none such, then for the benefit of the heirs at law or the distributees of the person whose death shall have been caused and shall be brought by or in the name of the executor or administrator of such person; and in every such action the jury may give such damages, including exemplary damages where such wrongful act, neglect, or default was the result of recklessness,

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wilfulness or malice, as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought. And the amount so recovered shall be divided among the beforementioned parties, in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate.

"Section 3957. Limitation of Actions for Wrongful Death —Liability for Costs.—All such actions must be brought within six years from the death of such person, and the executor or administrator, plaintiff in the action, shall be liable to costs in case there be a verdict for the defendant, or nonsuit or discontinuance, out of the goods, chattels and lands of the testator or intestate, if any."

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

NO. 242.

ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

LIZZIE M. MIMS, AS ADMINISTRATRIX OF THE ESTATE OF JOHN J. MIMS, DECEASED, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

BRIEF OF DEFENDANT IN ERROR.

The defendant in error, with permission of the Court, will rely upon its brief filed in support of the motion to dismiss or affirm, as its brief in this cause, on the hearing of the summary docket, and asks that this additional brief be considered in connection therewith.

NO FEDERAL QUESTION WAS PROPERLY RAISED IN THE STATE COURT.

The jurisdiction of this Court is conferred under Section 709 of the Revised Statutes of the United States, which gives jurisdiction:

> "Where any right, title, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States and the decisions is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority."

This Court has held that the provision emphasizes the necessity that the right must be specially set up and denied, and in order to maintain jurisdiction the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way, and that the proper time is in the trial Court whenever that is required by the State practice in accordance with which the highest Court of a State will not revise the judgment of the Court below on questions not therein raised, and the proper way is by pleading, motion, exceptions or other action, part or being made part of the record.

Mutual Life Ins. Co. v. *McGrew,* 188 U. S., 309, 47 L. Ed., 480.

The following provisions are found in the Code of Civil Procedure of South Carolina (Vol. II, Code of Laws of South Carolina 1912):

"Sec. 192. The complaint shall contain: * * *

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.

3. A demand of the relief to which the plaintiff supposes himself entitled."

"Sec. 193. The only pleading on the part of the defendant is either a demurrer or an answer. * * *"

"Sec. 194. The defendant may demur to the complaint when it shall appear upon the face thereof, either:

1. That the Court has no jurisdiction of the person of the defendant or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties, for the same cause; or,

4. That there is a defect of parties, plaintiff or defendant; or,

5. That several causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action."

"Sec. 197. When any of the matters enumerated in Section 194 do not appear upon the face of the complaint, the objection may be taken by answer."

"Sec. 198. If no such objection be taken, either by demurrer or answer, the plaintiff or defendant shall be deemed to have waived the same, excepting only the objection to the jurisdic-

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tion of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action, or that the answer does not state facts sufficient to constitute a defense: *Provided,* That in cases where the objection is made that the complaint does not state facts sufficient to constitute a cause of action, or that the answer does not state facts sufficient to consitute a defense, the party making such objection shall give at least five days' notice, in writing, to the opposite party of the grounds of such objection."

"Sec. 199. The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition."

"Sec. 200. * * *

2. * * * The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they may be such as have been heretofore denominated legal or equitable or both. They must each be separately stated and refer to the cause of action which they are intended to answer in such manner that they may be intelligibly distinguished."

In *Millan* v. *So. Ry. Co.,* 54 S. C., 491, it is held that under this section there need be no care that such separate defenses are inconsistent with each other.

"Sec. 219. Every material allegation of the complaint, not controverted by the answer, as prescribed in Section 199, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply, as prescribed in Section 203, shall, for the purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require."

All of the aforesaid Code provisions were adopted in 1870, excepting the proviso to Section 198, which was adopted in 1903, all long prior to the commencement of this action.

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Surely, under the South Carolina Code of Procedure the Supren Court of South Carolina was right when, in its opinion, it state

"The facts in every case should be pleaded." (R., p. 5.)

We call attention especially to the fact that the opinion of t Supreme Court of South Carolina does not hold that the Feder Employers' Liability Act must in terms or by reference to the A be pleaded in the complaint or answer, but that in order to make applicable in a trial in the Courts of that State that facts must be s forth either in the complaint or answer which would bring the ca under the Act, and the Court holds that the exclusion of the tes mony offered was proper as it was not responsive to any issue rais by the pleadings.

In our brief on the motion to dismiss or affirm, at page 11 theree we discussed the case of *Toledo & St. L. R. Co.* v. *Slavin,* 236 U. S 554, 59 L. Ed., 671, and we again urge that that authority does n go as far as the plaintiff in error contends, but this Court held that t Federal Act governs because testimony was admitted in the Sta Court that unquestionably brought the case within the Act. Motio was made for a directed verdict, and requests to charge were su mitted, under the Act, all of which was refused. What the Oh practice and procedure is does not appear, however the Ohio Appe late Courts seem to have considered the question properly raise

Since the Slavin case this Court has rendered its decision in *Ce tral Vermont R. Co.* v. *White,* 238 U. S., 507, and we submit th under that case the decision of the South Carolina Court is on matter of State pleading and practice and is binding on this Cou

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 242

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

LIZZIE M. MIMS, AS ADMINISTRATRIX OF THE ESTATE OF JOHN J. MIMS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM, ETC.

P. A. WILLCOX,
FREDERIC D. McKENNEY,
L. W. McLEMORE,
DOUGLAS McKAY,
Attorneys for Plaintiff in Error.

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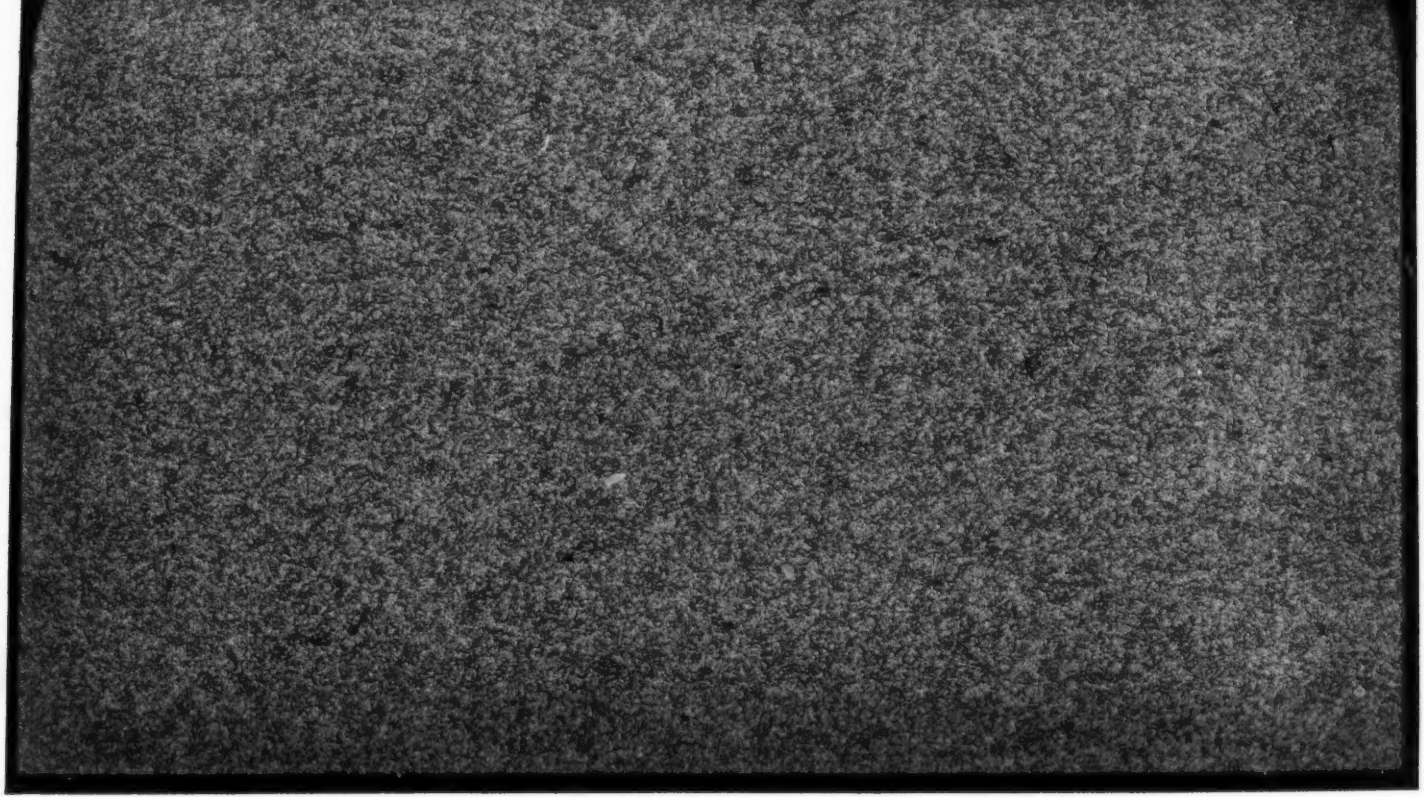

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 629.

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

LIZZIE M. MIMS, AS ADMINISTRATRIX OF THE ESTATE OF JOHN J. MIMS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM, ETC.

STATEMENT.

Plaintiff's intestate, John J. Mims, was a car inspector in the employ of the Atlantic Coast Line Railroad Company, the defendant below (plaintiff in error here).

While in the performance of his duties as such he was killed by being run over by a switching engine belonging to said company and being driven by another of its employees.

The accident occurred at or near a street crossing in the vicinity of the passenger station in Sumter, South Carolina.

The defendant in error, Lizzie Mims, is the widow of the deceased, and brought this action as administratrix of his estate for the benefit of herself and her minor children.

The negligence charged by the complaint was the reckless and wanton running backwards of said engine at an excessive and reckless rate of speed, in violation of the company's own rules and regulations, without proper lookout or giving warning of its movement.

The defenses were a general denial, coupled with plea of contributory negligence and a special plea of "gross negligence and willfulness on the part of the deceased."

Neither the complaint nor any of the defendant's pleas referred directly or otherwise to the Federal Employers' Liability Law, approved April 22, 1908, 35 Stats., 65, ch. 149.

In the course of the testimony given on plaintiff's behalf it developed that at the time of the accident the deceased was crossing the company's tracks on his way to inspect train No. 46, called the Orangeburg train, which had just arrived at the station (R., 12).

Thereupon the attorney for the defendant company announced that defendant would offer evidence "to show that train No. 46 was a train engaged in interstate commerce and that the deceased Mims was in this respect and otherwise engaged in interstate commerce," and that "the statute or law under which plaintiff has brought her action has been superseded * * * by the act of the Congress of the United States known as the Federal Employers' Liability Act of April 22, 1908, 35 Stats., 65, ch. 149" (R., 21).

Pursuant to such announcement various witnesses were called on behalf of defendant to prove that at the time of the accident both the deceased and the defendant company were engaged in interstate commerce within the meaning and provisions of the act of Congress cited, but the learned trial judge sustained objections made to the introduction of all such testimony and refused to permit the same in evidence because, as he stated from the bench, it had "no place in this case, interstate commerce cannot cut the State court out of jurisdiction to try this case," and was "irrelevant and not pleaded, and not brought up as an issue in this case" (R., 22), and was "generally incompetent, not relevant" (R., 23).

Similar rulings barring out all such evidence as and when offered in detail appear on pages 26, 27, 29, and 30 of the record, and the exceptions to such rulings appropriately preserved of record appear at pages 40 to 43, inclusive, thereof.

Under the charge of the trial judge, in the course of which, among other things, the jury was told that the statute (State) under which the action had been brought "says damages shall include both actual and punitive damages as are proportioned to the injury sustained by the persons by whom and on whose behalf the action is brought" * * * and that "To prevent the plaintiff from recovering it must be made to appear to the satisfaction of the jury that he was guilty of more than mere negligence, and that he was guilty of gross or wilful negligence, or was acting in violation of law, and that such gross or wilful negligence, or unlawful act, contributed to the injury as a proximate cause thereof" (R., 37), the jury returned a verdict in favor of the plaintiff for $16,000, and judgment was entered accordingly (R., 1).

On appeal, the Supreme Court of South Carolina upheld the rulings of the trial judge, and affirmed the judgment

appealed from in an opinion (100 South Carolina, 395) which, in pertinent part, is as follows:

(R., 44:)

WATTS, *A. J.*:

> "This was an action by plaintiff as administratrix for the benefit of herself and her four minor children to recover damages for the death of her husband on December 19, 1910, caused by the alleged joint and concurrent carelessness, negligence, recklessness, wilfulness, and wantonness of the defendants. * * * The suit was brought under what is commonly known as the Lord Campbell's act. The allegations of the complaint and answer do not show that plaintiff's intestate was engaged in interstate commerce at the time he was killed. * * * As soon as plaintiff's case was closed the counsel for defendants announced that train 46 which plaintiff's intestate was inspecting while (when) killed was engaged in interstate commerce, and that they would introduce testimony to show that in the inspection of this train and otherwise the plaintiff was engaged in commerce between the States, and consequently the Statute under which plaintiff was bringing her case had been suspended by the act of Congress of the United States known as the Federal Employers' Liability Act, April 22nd 1908. The (trial judge) refused to allow the defendants at that time under the pleadings to raise this issue and refused to admit any testimony in regard thereto." * * *

(R., 45:)

> "Exceptions 1 and 2 allege error on the part of the presiding judge in refusing to allow certain testimony, which the appellants contend would show that when plaintiff's intestate was killed he was engaged in interstate commerce and in refusing to allow testimony which defendants' counsel stated they would offer for the purpose of bringing the case under the Employers' Liability Act, and the remarks of the judge at that time. His honor took the position that the testimony was irrelevant and not responsive to

the pleadings and not an issue in the case. That the case had been passed upon by the Supreme Court and an amendment over objection of plaintiff allowed just before proceeding with the second trial. After the plaintiff's testimony was all in for the first time it seems to have occurred to the defendants that they wanted to avail themselves of the Federal statute, Employers' Liability Act. The facts in every case should be pleaded. Whenever the pleadings show facts pleaded that the case is one that can be tried either under the Federal or State law then the court can try it under either law. When the pleadings show facts that bring it under the Federal law it must be tried under the Federal law, and when the pleadings show it is brought under the State law *is* (it) must be tried under that law.

"The complaint was filed April 5, 1911 * * * It does seem to us that justice and fair dealing under all of the circumstances of the case should have *been* required the defendants if they intended to invoke the benefits which they thought would issue to them under the act of Congress to plead the facts applicable to bring it under the act. It would be an injustice at this stage of the case to allow this defense." * * *

(R., 46:)

"The plaintiff alleges that she has a cause of action against the defendants and is entitled to a trial either under the State or Federal law, the pleadings made out a case to be tried under the State law, and under the pleadings his honor was correct in ruling as he did. It is not necessary to plead either a State or Federal statute, but it is necessary to plead facts which bring it under the one or the other, and when the pleadings show that it was interstate commerce the State or Federal courts try it, and Federal law governs. When the pleadings show it was intrastate commerce the State law governs. The defendants should have pleaded the Federal act or at least such facts as would render the act applicable, and inasmuch as they did not do so and the pleadings made out a case based on the State law the exclusion of the evidence by his

honor complained of was proper as it was not responsive to any issue raised by the pleadings. If there had been an allegation in the answer that brought it within the Federal Employers' Liability Act it would have been controlled by the act, although the provisions may not have been referred to in express terms in the pleadings, and proof would be allowed in the case, but in this case there is no such allegation and his honor committed no error, and these exceptions are overruled."

ASSIGNMENT OF ERRORS.

The Supreme Court of South Carolina erred—
In holding and deciding that—

1. "The facts in every case should be pleaded" and "when the pleadings show it is brought under the State law it must be tried under that law"; and

2. That if the defendant railroad company intended to invoke the benefits of the Employers' Liability Act it was incumbent upon it "to plead the facts applicable to bring it under the act." Not having done so, and the case made out by the pleadings being "based on the State law, the exclusion of the evidence * * * complained of was proper," it not being responsive to any issue raised by the pleadings.

3. In affirming the judgment of the Court of Common Pleas for Richland County, thereby denying to plaintiff in error rights, privileges, and immunities under a law of the United States sought to be set up and claimed in proper course before the trial court.

ARGUMENT.

The motion to dismiss is plainly untenable and should be denied.

St. Louis & San F. Ry. Co. *vs.* Seale, 229 U. S., 156, 159, 161.
North Carolina R. Co. *vs.* Zachary, 232 U. S., 248.
Toledo, St. Louis & Western R. R. Co. *vs.* Slavin, 236 U. S., 454, 457.

In the Slavin case neither the complaint nor the answer contained any reference to the Employers' Liability Act, but, over plaintiff's objection, evidence was admitted which showed that the plaintiff, according to the allegations of his complaint, while in the performance of his duties in charge of a switching engine was riding on a car forming part of a train engaged in interstate commerce and belonging to defendant. Appropriate motions properly invoking the application of the Federal statute were made and overruled and verdict and judgment given for plaintiff and affirmed by the Supreme Court of Ohio. On writ of error this court, speaking through Mr. Justice Lamar, said:

> "But a controlling Federal question was necessarily involved, for, when the plaintiff brought suit on the State statute the defendant was entitled to disprove liability under the Ohio act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And, if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law.
>
> "In this respect the case is much like St. Louis, &c., Ry. *vs.* Seale, 229 U. S., 156, 161, where the suit was brought under the Texas statute, but the testimony

> showed that the plaintiff was injured while engaged in interstate commerce. The court said: 'When the evidence was adduced it developed that the real case was not controlled by the State statute, but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the State courts erred in overruling it.' The principle of that decision and others like it is not based upon any technical rule of pleading but is matter of substance, where, as in the present case, the terms of the two statutes differ in essential particulars."

In the case at bar the Federal statute and the South Carolina statute differed in essential particulars; for example, in the matter of contributory negligence less than gross or willful as a defense and the power to assess punitive damages, in both cases the State statute being the more oppressive so far as the defendant's position was concerned.

While differing in its circumstantial details, the case of Central Vermont Ry. *vs.* White, 238 U. S., 507, 513 (point 5), was adjudged in principle conformably with the above cases.

The duties being performed by Seale, "a yard clerk," in the first cited case (229 U. S., 156, 159) differed but slightly, if at all, from those being performed (R., 9) by Mims in the present case.

That such duties when performed or about to be performed in connection with a car or train or other instrumentality of interstate commerce constituted the employee as engaged in interstate commerce is settled.

> Seale case, *supra.*
>
> Shanks *vs.* Del., Lack. & West. R. R., 239 U. S., 556, 559.

That the testimony offered and rejected was pertinent and sufficient to prove that the train which Mims was on his way to inspect was engaged in interstate commerce, though moving only between terminii within a single State, is likewise established by the above-cited cases.

As was said in St. Louis, &c., Ry. *vs.* Hesterly, 228 U. S., 702, where it had been suggested by the defendant in error, Hesterly, that the defendant had estopped itself from relying upon the Federal law by pleading contributory negligence under the State law:

> "Moreover, the plaintiff, not the defendant, had the election how the suit should be brought, and as he relied upon the State law, the defendant had no choice, if it was to defend upon the facts. * * *
>
> "Coming to the merits it now is decided that the act of Congress supersedes State laws in the matter with which it deals. * * *
>
> "Therefore the ruling of the State court was wrong." * * *

Upon the authorities above cited it would seem quite plain that not only the motion to dismiss but also the motion to affirm should be denied.

This brings us to the third proposition embraced in defendant in error's motion, viz., in the event the court should desire to hear argument on the questions involved, the motion that this cause be transferred to the summary docket and there be proceeded with as a short cause, the suggestion being that the cause is of such a charcater as not to justify extended argument.

In this suggestion we concur, but while so doing we venture to suggest that in the light of the decided cases hereinbefore cited the judgment of the Supreme Court of South

Carolina is so plainly erroneous and so necessary to be reversed that oral argument, whether extended or otherwise, would be superfluous. As the defendant in error by his motion has fully disclosed not only his position upon the Federal question, but also the merits of the case itself, in so far as the only question here open for review is concerned, and as no differences in matters of fact or circumstance requiring elucidation have developed, we suggest that the rights of all parties would be perfectly preserved and the time of the court would be very properly conserved if the court upon its present inspection of the record and briefs should conclude that the judgment must be reversed and should so order.

We respectfully submit motion to that end.

This case differs from Chicago & N. Western Ry. Co. *vs.* Gray, 237 U. S., 399, and Chicago, Rock Island & Pacific Ry. Co. *vs.* Wright, 239 U. S., 548, *supra,* in that, as above pointed out, material differences operating prejudicially to the plaintiff in error exist between the State and Federal statutes in question.

It is respectfully submitted that the judgment of the Supreme Court of South Carolina under review should be reversed and the cause remanded to that court for further proceedings.

P. A. WILLCOX,
FREDERIC D. McKENNEY,
L. W. McLEMORE,
DOUGLAS McKAY,
Attorneys for Plaintiff in Error.

(30958)

ATLANTIC COAST LINE RAILROAD COMPANY *v.* MIMS, ADMINISTRATRIX OF MIMS.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 242. Argued December 4, 1916.—Decided January 15, 1917.

This court is without jurisdiction to review a judgment of a state court under Rev. Stats., § 709, Jud. Code, § 237, upon the ground that a federal right was denied, when the claim of federal right relied on was refused consideration in that court because it was not asserted at a proper time or in a proper manner under the established state system of pleading and practice.

The decision of the state court that a claim of federal right was not so presented is binding on this court when not rendered in a spirit of evasion for the purpose of defeating the federal right.

In accordance with the foregoing principles, a party desiring to secure the benefits of the Federal Employers' Liability Act in an action in a state court, must claim them in apt time and in an appropriate manner under the state rules of pleading and practice.

Writ of error to review 100 S. Car. 375, dismissed.

THE case is stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. P. A. Willcox*, *Mr. L. W. McLemore* and *Mr. Douglas McKay* were on the brief, for plaintiff in error.

Mr. William S. Nelson, with whom *Mr. J. Team Gettys*, *Mr. John H. Clifton* and *Mr. Jo-Berry Sloan Lyles* were on the briefs, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

On December 10th, 1910, John J. Mims, a car inspector in the employ of the plaintiff in error, when attempting to cross a track to inspect a train of cars which had just

arrived, was run down and killed by a switching engine at a public crossing in the City of Sumter, South Carolina.

In April following this suit was commenced by the filing of a complaint, which charges actionable negligence and alleges that the defendant owned and operated a line of railway described as wholly within the State of South Carolina. There is nothing in the complaint tending to state a cause of action under the federal law. To this complaint the defendant filed an answer which is a specific denial under the South Carolina Code of Civil Procedure and which contains two separate defenses. The first defense admits that Mims was killed at the time alleged, admits the paragraph alleging that the defendant, at the time of the accident complained of, owned and operated the line of railroad described as being wholly within the State of South Carolina, and denies all the other allegations of the complaint. The second defense is one of contributory negligence.

Upon this complaint and answer the case went to trial and when the testimony was all introduced the trial court granted a non-suit, which was reversed by the Supreme Court of the State with an order remanding the case for a new trial.

When the case was called for the second trial the defendant asked leave to amend its answer by pleading "gross and wilful contributory negligence" on the part of deceased, which was granted, and the trial proceeded until plaintiff rested her case.

Up to this time no claim had been made by defendant and no facts had been pleaded or evidence offered by either party from which it could be inferred that the deceased at the time of his death was engaged in interstate commerce, or that the Federal Employers' Liability Act was in any manner applicable to the case.

When the plaintiff rested her case on the second trial, the defendant for the first time offered to introduce

testimony which it is claimed, if admitted, would have tended to prove that the train which the deceased was in the act of approaching to inspect when he was killed "was engaged in interstate commerce and that the deceased was in this respect and otherwise engaged in interstate commerce." The trial court rejected this proffer of testimony on the ground that it came too late and was not relevant to any issue tendered by the pleadings in the case. No application was made for leave to amend the answer by adding the claim under the federal law.

The practice differs in the courts of the various States as to what testimony may be introduced under "a specific denial," such as was filed in this case, and the Supreme Court of South Carolina, while recognizing fully the ruling character of the Federal Employers' Liability Act when the facts making it applicable are properly pleaded, yet, upon full and obviously candid and competent consideration, decided, as we have seen, that under the settled rules of pleading in that State the evidence tendered was not admissible. The essential justice of this decision, which is the fundamental thing, commends it to our favor. The evidence admitted in the case shows that the train which the deceased was about to inspect when he was killed was a local freight train, with a run habitually, and on the morning of the accident complained of, wholly within the State of South Carolina. If the relation of the deceased to the traffic which this intrastate train carried was such as to give an interstate character to his service, that fact must have been known to the defendant from the day the accident occurred, and it could not possibly have been known to the plaintiff, and therefore surprise and delay certainly, and possibly defeat of plaintiff's claim under statutes of limitation, must have been the inevitable result of permitting the introduction of the proffered testimony late in the second trial, without the federal

right claimed from it having been "specially set up and claimed" in the answer of the defendant.

The plaintiff recovered a judgment, which the Supreme Court affirmed.

This epitome of the action of the state court shows that the claim under the federal statute now made was not presented until after the plaintiff had rested in the second trial of the case after it had been to the Supreme Court, and after the defendant, upon the opening of this second trial, had amended its answer by adding a third defense, without mentioning or in any manner attempting to plead the federal claim. Even at this stage of the trial the assertion of the claim consisted only in a tender of testimony, without any application to amend the answer.

To become the basis of a proceeding in error from this court to the Supreme Court of a State "a right, privilege or immunity" claimed under a statute of the United States must be "especially set up or claimed," and must be denied by the state court. Rev. Stats., § 709; Judicial Code, § 237. This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice, *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291, 308, and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right. *Central Vermont Railway Co.* v. *White*, 238 U. S. 507; *John, Guardian,* v. *Paullin*, 231 U. S. 583; *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148; *Layton* v. *Missouri*, 187 U. S. 356.

The plaintiff in error mistakenly argues that under recent decisions of this court it is not necessary to claim the benefits of the Federal Employers' Liability Act in a

pleading in a state court in order to obtain a review here of a decision denying or refusing to consider such a claim. Reference to the decisions relied upon shows that the federal right was in terms claimed in the petition in *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, and *Grand Trunk Western Ry. Co.* v. *Lindsay*, 233 U. S. 42; and that in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hesterly*, 228 U. S. 702, the decision proceeds upon the statement that, since the Supreme Court of the State held the federal question sufficiently raised and decided it, the objection that it was not saved was not open in this court. While it is true that the reports show that in *St. Louis, San Francisco & Texas Ry. Co.* v. *Seale*, 229 U. S. 156, and in *Toledo, St. Louis & Western R. R. Co.* v. *Slavin*, 236 U. S. 454, the federal act was not specially referred to in the pleadings, yet they were in such form that the trial court, either without objection or over objection which the Supreme Court of the State refused to sustain, admitted testimony making it necessary to apply the federal act in deciding each case. This, of course, was equivalent to holding that the pleadings in the trial court were in a form to justify the introduction of testimony in support of the federal claim, under the system of practice and pleading prevailing in the courts of the two States in which the cases were decided. This brings these decisions clearly within the principle of the conclusion we are announcing in this case.

While it is true that a substantive federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a federal right not having been asserted at a time and in a manner calling for the consideration of it by the state Supreme Court under its established system of practice and pleading, the refusal of the trial court and of the Supreme Court to admit the testimony tendered in support of such claim is not a denial of a federal right which

this court can review, *Baldwin* v. *Kansas*, 129 U. S. 52, *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, and therefore, for want of jurisdiction, the writ of error is

Dismissed.